SURVEY OF INTERNATIONAL LAW

IN RELATION TO THE WORK OF CODIFICATION OF THE INTERNATIONAL LAW COMMISSION

Preparatory work within the purview of Article 18, paragraph 1, of the Statute of the International Law Commission

(Memorandum Submitted by the Secretary-General)

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INTRODUCTION

1. Article 18 of the Statute of the International Law Commission provides that "the Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not". The same article lays down that "when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly".

The second session of the General Assembly by resolution 175 (II) instructed the Secretary-General to do the necessary preparatory work for the beginning of the activity of the International Law Commission. The resolution reads as follows:

> 175 (II). PREPARATION BY THE SECRETARIAT OF THE WORK OF THE INTERNATIONAL LAW COMMISSION
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> *The General Assembly,*
>
> *Considering* that, in accordance with Article 98 of the Charter, the Secretary-General performs all such functions as are entrusted to him by the organs of the United Nations;
>
> *Considering* that, in the interval between the first and the second sessions of the General Assembly, the Secretariat of the United Nations contributed to the study of problems concerning the progressive development of international law and its codification,
>
> *Instructs* the Secretary-General to do the necessary preparatory work for the beginning of the activity of the International Law Commission, particularly with regard to the questions referred to it by the second session of the General Assembly, such as the draft declaration on the rights and duties of States.
>
> *Hundred and twenty-third plenary meeting,*
> *21 November 1947.*

The object of this memorandum is to present considerations and to put before the Commission the data which may facilitate the accomplishment of its preliminary task as envisaged in article 18 of its Statute.

PART I

The Function of the Commission and the Selection of Topics for Codification

2. The selection of topics for codification must depend to a large extent upon the meaning which the Commission will attach to the term "codification" having regard to its Statute, to the discussions which preceded it, and to the experience of the previous efforts at codification. In article 15 of the Statute of the Commission it is stated that "the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in the fields where there already has been extensive state practice, precedent and doctrine". This is so as distinguished from the expression "progressive development of international law" which, in the words of the same article, "is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not as yet sufficiently developed in the practice of states".

3. These definitions of what constituted "progressive development" and "codification" were adopted for the sake of convenience. In particular it may be assumed that there was no intention that the Commission should limit itself, in the matter of codification, to mere recording, in a systematized form, of the existing law, i.e. of the law as to which there exists an agreed body of rules. The discussions of the Committee on the Progressive Development of International Law and its Codification of 12 May-17 June 1947 revealed general agreement on this aspect of the subject. In the statement made on 20 May 1947, the Rapporteur of the Committee, Professor Brierly, expressed full approval of the view that codification cannot be limited to declaring existing law. He said:

"As soon as you set out to do this, you discover that the existing law is often uncertain, that for one reason or another there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code rules of existing law which are absolutely certain and clear, the work would have little value. Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest which is the better view; where a gap exists he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly. But it is true that in this aspect of his work he will be suggesting legislation—he will be working on *lex ferenda*, not the *lex lata*—he will be extending the law and not merely stating the law that exists."[1]

Similarly, in his final report, as approved by the Committee, the Rapporteur said:

[1] A/AC.10/30, p. 3.

"For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps in and amend the law in the light of new developments."[2]

In its final report the Committee recognized that "the terms employed 'progressive development' and 'codification' are not mutually exclusive, as, for example, in cases where the formulation and systematization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by states".[3]

4. The same interpretation of the task of the Commission was given expression in the course of the deliberations of the General Assembly and of its Legal Committee which in November 1947 adopted the Statute of the Commission.[4] It will be noted that the provisional definition adopted in article 15 of the Statute of the Commission does not refer to the more precise formulation and systematization of rules of international law as to which there is substantial agreement. The Statute refers to fields "where there already has been extensive state practice, precedent and doctrine".

5. In adopting that view of the task of the Commission in the matter of codification as not confined to a mere restatement of the existing law, the Codification Committee and the Legal Committee were following the experience of the work of codification under the League of Nations. The problem confronted the Committee of Experts at the very outset of its activity. At the first session of the Committee, held from 1-8 April 1925, most of its members emphasized that its task went beyond that of registration of existing law. The considerations adduced by the members of the Committee in support of that view are persuasive, and it may be useful to cite some of them. Thus Dr. Suarez said:

"The task of the Committee should not be limited to a systematic cataloguing of questions of an international administrative character, but should endeavour to reach solutions and to prepare agreements on disputed

[2] A/AC.10/50, p. 7.

[3] A/AC.10/51, p. 4. The merely relative and provisional value of definitions adopted in this matter may be gauged by the fact that in its communication addressed in 1931 to the Council of the League of Nations in connexion with the future work of codification, the British Government used the term "codification" in the sense in which "development" is used in the Statute of the Commission. It described codification as "free acceptance, by means of law-making conventions, of certain rules by which the parties to such conventions agree to abide in their mutual relations". The process defined in the Statute of the Commission as "codification" was described in the British memorandum as "consolidation", i.e., "the ascertainment and establishment in precise and accurate legal phraseology of rules of international law which have already come into existence": *League of Nations, Official Journal, Special Supplement No. 94*, pp. 101-114, at p. 102.

[4] Thus M. Castberg was of the opinion that no sharp distinction should be made between codification and progressive development. In his view, the International Law Commission should be free to explore the field of international law without being necessarily bound by international precedent: Sixth Committee, 25 September 1947, p. 2 (A/C.6/SR. 37).

questions. Many questions were in dispute, not because they were insoluble, but because hitherto there had been no impartial legal authority which was above suspicion and in a position to suggest conclusions or arrive at a general *modus vivendi*. In his view, the task of the Committee was not merely passive and confined to codifying points on which the States seemed to be in agreement. The Committee had also an active mission in the sense of drawing attention to general principles and seeking general conclusions, and of settling questions in regard to which the modern international community of interests made it necessary to secure legal uniformity."[5]

Professor Diena reiterated that view. He expressed the hope that the members of the Committee would "probably consider that they should not content themselves with registering results already obtained, but that they ought to contribute as fas as possible to the progress of international law".[6] Dr. Rundstein, a Polish jurist of distinction and experience, expressed himself in terms even more emphatic:

"The codification of international law was an act of legislation. It was a legislative process in the broad sense of the term. It was necessary to distinguish from codification a process which in Anglo-Saxon law was known as 'consolidation'. Consolidation would be equivalent to a mere act of registration—that was to say, the arrangement and classification of rules already existing.

"He regarded codification as a creative process. By unifying existing rules, it discovered new rules which were inherent in them, and crystallised the principles which emerged from legal and customary practice."[7]

Professor Brierly insisted that "the Committee should endeavour to find those subjects of international law which were of practical, not of theoretical interest and, if possible, to choose questions which, in the present condition of international law, were causing difficulties to Government by international agreement".[8] Professor De Visscher pointed out that "codification, even in its strictest sense, always implied a certain legislative element, as it aimed at achieving a certain uniformity and at reducing to a minimum the differences which existed between the various schools".[9]

6. This insistence on the legislative aspect of the work of the Committee was not due to the absence of suggestions outlining the possibilities of a mere restatement. Thus Mr. Wickersham drew attention to the work, in the United States, of the Commissioners of Uniform State Legislation and, in particular, of the American Law Institute with regard to so-called restatements of various topics of customary law which, after full discussion and adoption by the Institute, would be treated by the courts as reliable statements of the existing law.[10]

[5] *Minutes of the First Session*, 1925, p. 7.
[6] *Ibid.*, p. 8.
[7] *Ibid.*, p. 14.
[8] *Ibid.*, p. 17.
[9] *Ibid.*, p. 25.
[10] *Ibid.*, p. 7.

7. In fact, the terms of reference of the Committee indicated with some clarity that its work was not to be confined to a passive registration of the existing law. The preamble of the resolution adopted by the Assembly in September 1924 and requesting the Council to convene the Committee of Experts referred to the "legislative needs of international relations". At the first meeting of the Committee, its Chairman put on record the view that "it was difficult to believe that the League of Nations, in setting up the Committee of Experts, desired to limit the activity of the Committee to a codification which was nothing more than a process of registration".[11] Subsequently, the resolution of the Assembly of 27 September 1927, declared that codification "should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to the contemporary conditions of international life".

8. In so far as the Hague Codification Conference of 1930 achieved positive results, in particular in the field of the law of nationality, it was generally recognized that its work was largely legislative in character. The true position in the matter was put with some clarity by one of the United States delegates to the Conference. He said:

"Early in the discussions at the recent Hague Conference it was realized that there was little international law on the subject of nationality which could be codified, if 'codification' is to be limited to the reduction to writing of rules of law already agreed upon by states. The idea of such a declaration of existing law was, therefore, early discarded at the Conference, and all efforts were directed toward the formulation of a convention to embody rules governing conflicts of nationality laws, regardless of whether such rules declared old law or made new law."[12]

In fact, it was pointed out that article 18 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws declared that "the inclusion of the above mentioned principles and rules in the convention should in no way be deemed to prejudice the question whether they do or do not already form a part of international law". The two principal protocols adopted at the Conference—that relating to the obligations of military service of persons of double nationality and that referring to the deportation of persons deprived of their nationality while abroad—were distinctly legislative in character. Governments represented at the Conference shared in that interpretation of its work. In fact, when the Assembly of the League of Nations laid down in 1927 the broad principles of the Conference to be convened, it adopted the recommendation of its First Committee to the effect that "the Governments which might be invited to the Conference should be informed that the codification effort to be undertaken by the First Codification Conference must aim at adapting existing rules to contemporary conditions".[13] It may be added that the experience of the Hague Codification Conference was, in this respect, a

[11] *Minutes of the First Session*, 1925, p. 15.

[12] Flournoy in *American Journal of International Law*, 24 (1930), p. 468.

[13] *Official Journal of the League of Nations, 1927, Special Supplement No. 55.*

repetition of the history of some previous international instruments—such as the Declaration of London of 1909—which, although described at the outset as merely aiming at codifying existing international law, were in fact to a large extent of a legislative character.[14]

9. The experience of the Hague Codification Conference of 1930 and of the entire work of codification under the auspices of the League of Nations led most Governments to a firm rejection of the view that codification can—or ought properly to—be confined to those branches of international law with regard to which there exists a full and clear agreement as ascertained by a uniform governmental practice, judicial precedent and doctrine. Some of the reasons underlying this attitude have been stated by Governments; others, no less cogent, are closely related to the question of the standards of selection of topics for codification. It is therefore necessary to set them out in some detail.

10. In the first instance, there are only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification. The survey undertaken in part II of this memorandum shows that while in most branches of international law there is a common basis of agreement on principle, there is a wide divergence of practice in the matter of its detailed application. This applies even to questions with regard to which, because of the vast amount of existing practice, it has been customary to assume an almost universal measure of agreement—as, for instance, on the subject of the law relating to consuls or to jurisdictional immunities of States. Thus, with regard to the former subject, we find the following observation on the part of the authors of the Harvard Research Draft Convention: "A perusal of the material indicates that comparatively few of the functions and privileges of consuls are established by universal international law. Thus a code on the subject will be to a large extent legislation."[15] The authors of the Draft Convention on the Competence of Courts in regard to foreign States thought it necessary to append the following caveat: "The present draft convention is an endeavour to offer a set of

[14] Thus, with regard to the Declaration of London, Great Britain as the convening State informed the participating Powers that the main task of the Conference would not be "to deliberate *de lege ferenda*" but to "crystallize, in the shape of a few simple propositions, the questions on which it seems possible to lay down a guiding principle generally accepted". The Declaration itself stated that "the Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the gentrally recognized principles of international law". Actually, in vital matters—such as the application of the doctrine of continuous voyage to conditional and absolute contraband, the Declaration created new law by way of compromise. For that reason article 65 provided that the Declaration must be accepted as a whole or not at all. When in 1916 the British and French Governments announced that they would no longer act upon the provisions of the Declaration, they did so in order, as stated in the announcement, that they might revert to the rules of customary international law as they existed prior to the Declaration.

[15] At p. 214.

rules on this subject which may prove acceptable to the States of the world. The convention does not purport to be merely a declaration of existing international law."[16] In the matter of piracy—another subject abundantly covered by international practice—the discussions before the Committee of Experts revealed disagreement not only on matters of detail, but also with respect to the broad principle governing the subject. Thus M. Fromageot denied emphatically the right of a State to try a piratical ship flying the flag of a foreign State. He insisted repeatedly that the French Government had never recognized the right of jurisdiction by another country over a ship flying the French flag, and that a crime committed on the high seas was justiciable only by the country whose flag the incriminated vessel flew.[17]

11. It is clear that if the task of the International Law Commission were confined to fields with regard to which there is a full measure of agreement among States, the scope of its task would be reduced to a bare minimum. It would be reduced to matters of small compass the exclusive preoccupation with which would impair from the very inception the stature and authority of the International Law Commission. The League of Nations Committee of Experts, the resources of which were distinctly limited when compared with those available to the International Law Commission, consistently refused to become a party to any such interpretation of the scope of its function. It did not consider, for instance, that the subject of the revision of the classification of diplomatic agents merited its continued attention.

12. The view may be put forward—and it has been put forward by jurists of high authority—that codification of international law ought not to be concerned with the detailed regulations of its various branches, but that it ought to be confined to laying down their general principles—*"les grandes lignes"*.[18] If that view were adopted, the task of codification would undoubtedly be simplified and rendered easy. However, both the necessity for and the usefulness of any such course are open to question. The task, thus conceived, would hardly appear to be necessary. For there is no lack of wide agreement on general principles in most branches of international law. Neither would any appreciable measure of usefulness attach to the task of the Commission thus interpreted. What is required—for the sake of the authority of international law, the alleviation of the task of international tribunals, and the removal of one of the traditional causes of the unwillingness of States to submit disputes to the compulsory jurisdiction of international tribunals—is the introduction of certainty, precision and uniformity in matters of detail. That task is in fact comprised within the terms of reference of the International Law Commission.

[16] At p. 474.

[17] *Minutes of the Third Session*, 1927, p. 45.

[18] See, for instance, the observations of Judge Alvarez in *Annuaire de l'Institute de Droit international* (1947), pp. 53, 54, 60, 61.

It will also be noted that, with regard to many matters, codification, if limited to the ascertainment of the existing legal position, would amount to a mere registration of existing disagreements.

13. The second main objection to codification conceived as a mere registration—in a systematized form—of the existing law is that it may crystallize the law in matters in which the existing rules are obsolete and unsatisfactory. Codification which constitutes a record of the past rather than a creative use of the existing materials—legal and others—for the purpose of regulating the life of the community is a brake upon progress. This factor was one of the reasons why some Members of the United Nations have expressed doubts as to the method of mere restatement by experts of the existing law. In the statement of the Dutch representative a warning was uttered against such restatement by experts as being a "purely static function". It was alleged that "it can only 'freeze' international law in the shape in which it is at a certain moment".[19] There is probably no reason for such apprehension. For restatement—properly conceived and as, in fact, interpreted in the Statute of the International Law Commission—is not confined to a mere registration of the existing law. But the apprehension thus voiced is significant. It draws attention to the drawbacks and dangers of codification when regarded as confined to a statement of the existing law. There is no compelling reason why the International Law Commission should be exposed to that danger and why it should attach a restrictive meaning to the term "codification". This is not a question of creating new law on subjects which fall within the category of "progressive development of international law" for the reason that they have not yet been regulated by international law or that there is not as yet a sufficiently developed practice of States in regard to them. For there are subjects which have been regulated by international law, but the regulation of which is unsatisfactory and fragmentary. The law with regard to these subjects has sufficiently developed, but it has not developed in a manner compatible with the requirements of a peaceful and neighbourly intercourse of States. These subjects fall within the category of codification of international law as envisaged in article 15 of the Statute.

14. Finally, codification conceived as confined to a mere registration, in a systematized form, of existing law would be open to the objection, often voiced by Governments in regard to conventions codifying international law, that it would be interpreted as a replacement of customary international law by what is in effect a treaty. The disadvantages of any such consummation have often been stated. It would expose what has hitherto enjoyed the unchallenged and secure authority of a customary rule to the uncertainties and vicissitudes of treaties in all phases of their creation and operation. It might be interpreted as doing away with those parts of customary law which it has failed to include within the orbit of

[19] Committee on the Progressive Development of International Law and its Codification, statement by the Netherlands representative: A/AC.10/8; A/AC.10/23.

the codifying instrument. It is true that some international codifying conventions—such as the Fourth Hague Convention on the Rules and Customs of War on Land and the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws—provide expressly that they do not derogate from customary international law; but the possibility of written codification being interpreted as laying down the existing law and no more has led some Governments to draw attention, in emphatic terms, to the drawbacks of that conception of codification.[20] Some Governments have, because of these apprehended drawbacks, gone to the length of suggesting that codification should refrain from registering existing international law and that it should "lay down rules which it would appear desirable to introduce into international relations in regard to the subjects dealth with."[20] It is not believed that such suggestions are likely to secure

[20] Statement of the Swiss Government in 1931 in connexion with the discussion of the future work of codification (League Doc. A.12(b) 1931.V., p. 3.) Part of that statement may usefully be quoted: "It is not the task of codification conference to register existing international law, but to lay down rules which it would appear desirable to introduce into international relations in regard to the subjects dealt with. Their work should, therefore, mark an advance on the present state of international law. In certain cases, indeed, it would be extremely difficult to say what the existing law really is, as it is not clearly known or is a matter of controversy. It would be most unfortunate if the attempt to discover an adequate solution of an important problem were abandoned on the ground that no such solution is to be found in the existing positive law. One of the fundamental tasks of codification conferences should be to choose between disputed rules and, within the limits of their agenda, to fill up the gaps in a law whose deficiencies and obscurities are obvious." The relevant part of the statement of the French Government ran as follows: "It is necessary to bear in mind that to attempt to negotiate and conclude conventions with the object of setting out the rules of customary law in the form of written law would involve a danger of creating unnecessary difficulties and, *inter alia*, of throwing doubt upon the existence of particular rules which an international judge, as for example the Permanent Court of International Justice, would have been in a position to recognize. It appears, therefore, that codification by way of conventions ought not to be directed towards the laying down of rules which would be declared to be already part of existing international law." (*Ibid.*) The statement made in May 1947 by the Swedish representative before the Codification Committee followed similar lines: A/AC.10/24. It recalled, with approval, the following statement made in 1931 by the Swedish Government to the League of Nations: "The Government of Switzerland, being in agreement with the three-fold consultation of Governments recommended in the Resolution adopted at the Hague asked in its reply whether the codification conventions should be declaratory or enactory, whether they should supplant or supplement customary law. The Federal Council of Switzerland declared that 'such new law cannot have the effect of merely supplanting the old. The old law, which is derived from international practice or the decisions of international tribunals, or from both combined, remains in force in its entirety. Otherwise we should be forced to the conclusion that States not bound by the new conventions are free from all obligations. International law would be shaken to its very foundations, and codification accepted in this sense would cause irreparable harm'." (*Ibid.*) The same view was given expression in the resolution of the Institute of International Law adopted in 1947: "L'Institut de Droit international, Reconnaissant combien est désirable une codification du Droit des Gens, de nature à dissiper certaines de ses incertitudes et favoriser son observation: Souligne les dangers que présenterait actuellement toute codification officielle suivant la méthode de la Conférence de Codification de La Haye de 1930, dans la mesure où elle fondait la force obligatoire des règles codifiées sur l'acceptation expresse des États. Une telle méthode aboutit à fournir à chaque gouvernement l'occasion de remettre en question, par son refus d'acceptation, des règles de droit que la doctrine et la jurisprudence considéraient, d'une manière générale, jusqu'à cette date, comme établies; il existe de ce fait un risque d'affaiblir et d'ébranler le droit que la codification avait pour objet de préciser et de consolider." (*Annuaire de l'Institut de Droit international* (1947), p. 261.)

general approval. They are not in accordance with the task of the International Law Commission as understood by the Codification Committee which in May and June 1947 framed the terms of its reference or by the General Assembly. Neither are they in accordance with the terms of the Statute of the Commission. But they are helpful inasmuch as they emphasize the drawbacks of considering the registration or systematization of existing international law to be the only task of the International Law Commission or the only or main criterion for the selection of topics for codification.[21] An International Law Commission which limits its function to that of a research institute for the collection of material and for registering either existing agreement or, perhaps, more frequently, the absence of agreement, would not be fulfilling the purpose assigned to it by its Statute. Neither would it be fulfilling the urgent need of international society which has prompted the codification movement from its inception and which has found an expression in the provisions of the Charter of the United Nations.

15. It follows from what has been said in the preceding sections of this memorandum that the existence of agreement—or the measure of such agreement—on any particular topic cannot be regarded as an adequate criterion for the selection of topics for codification. The experience of the work of codification under the auspices of the League of Nations denies the validity or usefulness of any such standard. This being so, what is the standard of selection to be adopted by the Commission? The Statute of the Commission provides—in article 18 (2)—that "when the Commission considers that the codification of a particular topic is *necessary or desirable* it shall submit its recommendations to the General Assembly". However, the expression "necessary or desirable" is not self-explanatory. It still leaves the Commission with the substantive responsibility for the task of selection. When is a subject ripe for codification in the sense that its codification is "necessary or desirable"? There is room for the view that a topic is ripe for codification in this sense if the importance of the subject-matter—from the point of view of the necessities of international intercourse, of the wider needs of the international community, and of the authority of international law—requires that, notwithstanding any existing disagreements, an attempt should be made to reduce it to the form of a systematized and precise branch of international law. This was the interpretation given to that term by the Committee of Experts and by the Assembly of the League of Nations in connexion with the work of codification.

[21] For the same reasons it is doubtful whether the resolution of the Institute of International Law on the subject of codification adopted in August 1947 adequately expresses the objects of codification. The relevant part of the resolution runs as follows: "L'Institut, sans écarter la possibilité de conventions et de déclarations internationales sur les objets pour lesquels elles seraient jugées réalisables, estime que, pour le moment, la contribution la plus importante à l'oeuvre de codification consisterait à effectuer, sur le plan national et international, des recherches de caractère scientifique en vue d'arriver à la constatation exacte de l'état actuel du droit international. Cet inventaire servirait de base tant à un effort doctrinal qu'à un effort officiel entrepris suivant des méthodes jugées mieux appropriées, en vue de combler les lacunes du droit international et de parer à ses imperfections." (*Annuaire de l'Institut de Droit international* (1947), p. 262.)

16. It is significant that the topics eventually selected by the Committee of Experts and the Assembly for codification were not "ripe" for it in the ordinary sense of the word (i.e., in the sense of having behind them a substantial body of agreement). They were topics with regard to which practice had previously registered a distinct measure of disagreement; with regard to which the divergencies had reference to political and economic interests of apparent importance; and in relation to which divergent traditions of national law and jurisprudence had indicated from the outset the difficulties of codification. The statement may sound paradoxical, but the affirmative criterion of "ripeness" as eventually acted upon seemed to have been not the case with which the subject could be codified, but the difficulty, as expressed in existing divergencies and in the need for regulation, of regulating it by way of codification. This applied to all three topics eventually chosen as the subject matter of the Hague Codification Conference in 1930. The difficulties besetting the codification of these topics were discussed in full by the Committee of Experts. The objections, of a political and legal nature, to codifying any of these subjects were put before them fully and forcibly.[22] They were not discarded without thorough discussion. Moreover, the eventual choice of subjects ripe for the Codification Conference or for codification generally was not due exclusively to a decision of the Committee of Experts or even the Council and the Assembly of the League. It was made, in the first instance, by Governments the overwhelming majority of which answered in the affirmative the question whether they regarded these subjects as a suitable topic for codification. Thus, with regard to State responsibility,

[22] Thus with regard to Nationality, M. Fromageot pointed out that these questions were closely connected with the constitutional, social, economic and racial interests of each country, and would undoubtedly raise obstacles of a political kind. He was doubtful whether it was possible to settle by means of a general convention matters with regard to which the interests of various States were so different if not contradictory (*Minutes of the Committee of Experts, First Session*, 1925, p. 29). On the other hand, Mr. Wickersham urged that members of the Committee should not restrict themselves to certain questions because they feared that others might possess a political character. He said: "There was a great difference between political questions and questions raising political obstacles. It was, for instance, quite possible to examine in a purely scientific manner the legislation regarding the status of married women. He did not believe that the Government of his own country, for instance, whose legislation on the subject was very recent, would in any way object to such an investigation. Were the Committee to set aside all questions which might possibly raise political considerations, its work would be very greatly reduced" (*ibid.*, pp. 29-30). But it is significant that the Committee appointed a sub-committee to enquire: (1) Whether there are conflicts of law regarding nationality the solution of which by way of international conventions could be envisaged without encountering political obstacles; (2) If so, what these problems are and what solution should be given to them" (*ibid.*). With regard to the question of territorial waters, the French representative thought that "it was not sufficiently ripe for it affected too closely the internal or external policy of States, their social life and the stability of their institutions" (*ibid.*, Third Meeting, 1927, p. 14). On the other hand, Dr. McNair, while admitting the existence of wide divergencies, drew attention to a considerable consensus of opinion in favour of the desirability of attempting to reconcile the divergencies of view on this thorny subject. He feared that if the Committee were not satisfied with the degree of unanimity manifested on this question, it would find very few questions indeed which it could consider ripe for international treatment (*ibid.*). Similarly, with regard to territorial waters, M. Fromageot urged that "it was impossible to contemplate an open convention on a question regarding which the contracting parties possessed interests which were quite unequal" (*ibid.*, p. 31).

twenty-two Governments expressed themselves in favour of codification, while only two dissented and five made reservations.[23] At the same time, a number of topics were discarded or postponed although with regard to them the measure of existing agreement and the prospects of achieving success were considerable. Thus with regard to diplomatic immunities the replies of Governments were almost unanimously in favour of codification.[24] Matters of a limited compass and technical character were discarded for the ostensible reason that they were not urgent. This was clearly revealed in the discussions concerning the revision of the classification of diplomatic agents.[25] This view was put forcibly by the representative of the United States. Mr. Wickersham said: "The Committee would be making a mistake if it were to choose a subject of secondary importance at a moment when the world was calling for the establishment of the Rule of Law in the place of the Rule of Force. The Committee would expose itself to the criticism of having been superficial, and of having wasted its time, when the chief object should have been to solve certain major problems of international law."[26] It seems almost as if the decisive criterion of ripeness and desirability of codification was not the existence of agreement, but the fact of the existence of discrepancies and divergencies rendering international regulation necessary. "One would perhaps not be accused of extravagance of expression if he suggested that a more difficult subject could hardly have been selected for the first Codification Conference"—this observation, with regard to the question of State responsibility, by one of the delegates of the United States,[27] is indicative of what may perhaps be regarded as one of the principal factors determining the choice of subjects of codification.

17. The experience of codification under the League of Nations and of the work of its Committee of Experts cannot be without instruction for the future work of the International Law Commission. That experience shows that the decisive criterion must be not the ease with which the task of codifying any particular branch of international law can be accomplished, but the need for codifying it. A subject of small dimensions with regard to which general agreement could be taken for granted would not be a "necessary or desirable" subject of codification. On the other hand—and in this respect the task of the International Law Commission in the matter of codification differs from that of the Committee of Experts—the test of such desirability and necessity need not be sought in the immediate urgency of some new topic requiring regulation. For any such need is covered by the other major task of the Commission, namely, the development of international law.

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[23] *Committee of Experts, Third Session*, 1927, p. 13.

[24] *Ibid.*, p. 33.

[25] *Ibid.*, pp. 17-19.

[26] *Ibid.*, p. 18.

[27] Mr. Hackworth in *American Journal of International Law*, 24 (1930), p. 516.

18. It will thus be seen that the standard of selection of topics for codification cannot be found by reference to any single test such as the degree of agreement or disagreement on the subject or the urgency of its formulation. In a substantial sense the existence of a high degree of agreement in the field of customary international law would be irrelevant in this connexion—for if there is a conspicuous measure of agreement then codification might appear neither necessary nor, according to many, particularly desirable in view of the disadvantages attaching to the transformation of custom into treaty. If, on the other hand, the absence of agreement and the existence of disagreement is a recommendation for codification, then the latter would approach a legislative process for the success of which there is no warrant in international society as at present constituted. For the more urgent the regulation of a subject appears to be having regard to the continued adherence of States to divergent practices, the more difficult it may be to remove effectively such divergencies by means of codification expressed in binding conventions and not falling within the purview of "development of international law". For this reason it is not likely that, apart from novel subjects falling within the category of development of international law, it is feasible to assign any obvious priority to certain subjects, as distinguished from others, from the point of view of urgency in the field of codification.

19. While it is thus clear that the test for the selection of topics is neither easy nor automatic, the difficulty surrounding the question can be solved to a large extent when it is borne in mind that the selection of topics is part of the major task of the Commission, which may extend over a generation, of codifying, in the various forms contemplated by the Statute, the entire body of international law. Selection there must be because, obviously, the Commission cannot codify the whole of international law at once. But provided it is realized (*a*) that the regulation of urgent and *novel* questions requiring a legislative effort is covered by that part of the work of the Commission which is described as development of international law, and (*b*) that the eventual codification of the entirety of international law must properly be regarded as the ultimate object of the International Law Commission—then the question of selection of topics no longer presents an insoluble or perplexing problem. If we bear that in mind, then the question of selection of topics is no longer one of haphazard and, possibly, arbitrary choice, but one of fitting the work of the Commission at any particular time into the orbit of a comprehensive plan. The selection then becomes a question to be determined by considerations of convenience, of available means and personnel, of classification, and of scientific symmetry. From this point of view the Statute of the Commission provides one standard of selection which, upon analysis, if of greater usefulness than may appear at first sight—namely, that codification is, in the language of article 15 of the Statute of the Commission, to cover fields "where there already has been extensive state practice, precedent and doctrine". This may comprise the entire field of international law as traditionally expounded in text-books

and treatises. There is nothing in the Statute of the Commission which prevents it from envisaging its task of selection and of execution of individual projects of codification as forming part of the eventual codification of international law as a whole. It is probably within the framework of some such comprehensive undertaking that the otherwise perplexing and intractable problem of selection of topics may be brought nearer solution. In fact, the Statute of the Commission contemplates the process of selection of topics as being the result of a survey of the whole field of international law. In this connexion the deliberations of the Committee of Experts, at its fourth session in 1928, in the matter of the Paraguayan proposal for the preparation of a general and comprehensive plan of codification of international law will be found to be of interest. The Committee pointed to the possibility of drawing up "a systematic outline of a more complete codification, on the understanding always that what was contemplated was not immediate and simultaneous realization of a plan thus formed".[28] The Committee itself felt that it could not undertake that task seeing that its original mandate appeared "more than sufficient to occupy its efforts during the infrequent and short sessions which circumstances permitted it to hold". The character and status of the International Law Commission, as envisaged by its Statute and by the General Assembly, in no way preclude it from interpreting the scope of its function by reference to a wide and comprehensive task in keeping with the place which the codification of international law occupies in the Charter of the United Nations.

20. The task of the Commission in deciding upon its plan of work is simplified by the deliberate elasticity of its Statute. The character of the work of the Commission is no longer determined by the necessity of producing such drafts only as are intended to materialize as conventions to be adopted by a considerable number of States. The Statute provides for possibilities of various kinds with regard to action which may be taken by the General Assembly in the matter of the drafts produced by the Commission. The Commission may submit a complete draft on a subject which, because of the existing divergencies and uncertainties, or for other reasons, is not likely to secure the acceptance of the majority of States. Nevertheless the draft thus adopted may be a model piece of codification. It may state accurately the existing law on matters on which there is agreement. It may clarify the position in other respects. It may provide for solutions of conflicting views and practices. And it may even go to the length of proposing changes in what it considers to be agreed law if it arrives at the conclusion that the existing law is unsatisfactory or obsolete. Any such draft, accepted by the Commission, may, because of the absence of likelihood of its securing a sufficiently wide measure of support, be

[28] *Minutes of the Committee of Experts, Fourth Session,* 1928, p. 52. See also the *Minutes of the First Session,* 1925, p. 18, for the suggestion that the Committee should draw up "a kind of a balance sheet of international law" as a preliminary step for the selection of topics.

considered a proper subject for a recommendation to the General Assembly under (*a*) or (*b*) of article 23, of its Statute, but not under (*c*) or (*d*). This means that the Commission may be of the view that a draft, however sound and desirable in itself, would best serve its purpose in the scheme of codification if it remained in the form of a draft either merely submitted to the General Assembly or of which the General Assembly has taken note or which it has approved by resolution without going to the length of recommending it to the Members of the United Nations with a view to the conclusion of a convention or without proceeding to convene a conference for the purpose of concluding a convention. Drafts which are permitted to retain that preliminary status—under (*a*) and (*b*) of article 23 of the Statute of the Commission—would be contributions to the eventual codification of international law in the form of conventions. They would exercise influence partly as statements of the existing law and partly as pronouncements of what is a rational and desirable development of the law on the subject. They would be at least in the category of writings of the most qualified publicists, referred to in Article 38 of the Statute of the International Court of Justice as a subsidiary source of law to be applied by the Court. Most probably their authority would be considerably higher. For they will be the product not only of scholarly research, individual and collective, aided by the active co-operation of Governments, of national and international scientific bodies, and the resources of the United Nations. They will be the result of the deliberations and of the approval of the International Law Commission. Outside the sphere of international judicial settlement they will be of considerable potency in shaping scientific opinion and the practice of Governments.

21. If this picture represents an adequate account of the possibilities opened up by the procedure envisaged in article 23 of the Statute of the Commission then it is probable that, after a time, practically the entire field of international law may be covered—codified—by the products of the work of the Commission of various forms and of varying degrees of authority. There will be drafts which the Commission has considered to be sufficiently satisfactory to warrant publication as a Commission document, but with regard to which no other action will, for the time being, be regarded as necessary. Drafts will be in existence of which the General Assembly has taken note or which it has approved by resolution. There will be drafts which the General Assembly has recommended to Members with the view to the conclusion of a convention. Even if the suggested convention does not materialize, the drafts thus dealt with by the General Assembly will be of considerable authority. The same will apply, to an even higher degree, to drafts with regard to which the General Assembly has recommended the convening of a conference for the purpose of concluding a convention. This will be so even if the conference or convention—or both—do not materialize. Finally, there will be drafts which have in fact ripened into conventions. And the Conventions themselves will differ in authority having regard to the numbers and the importance of

the States which effectively become parties to them. Experience has shown that the quest for unanimity in conventions of this kind is both futile and, in effect, retrogressive.[29]

22. There is thus no reason why in two decades or so of such activity the results of the work of the International Law Commission should not cover practically the entire field of international law. Such results would not constitute a single comprehensive piece of codification, but they would provide the basis of some such ultimate achievement. They would show that the compromise represented in the present Statute between the views of those who would confine the work of the International Law Commission to unofficial statements and restatements of the existing law and those who would limit it to preparing drafts of formal conventions, is a workable instrument of beneficent potentialities. From this point of view the survey of the whole field of international law which the Commission is instructed to undertake appears to be in keeping with the ultimate task of the International Law Commission as the principal instrument for the codification of international law.

23. The view underlying this part of the present memorandum is that urgent and novel questions demanding international regulation are covered by that aspect of the function of the Commission which relates to "development of international law", and that "codification" embraces, in principle, the entire field of international law. If that view is accepted the question of selection of topics in the matter of codification becomes simpler and less perplexing than may otherwise be the case. The selection will no longer be determined exclusively by the necessity of producing drafts likely to secure immediate acceptance in the form of conventions. Neither will the work be confined to a mere passive registration of agreement or disagreement. It may be expected that the Commission will be guided by the desire that ultimately its drafts should be accepted as law and that therefore they should be of such a nature and quality as to qualify them for a place on the international statute book within the framework of the comprehensive task of codification. The "statements" and "restatements" of the law are but a necessary and preliminary step in the process of eventual codification in the form of conventions. This was the view not

[29] The Assembly of the League adopted in 1927 a resolution relating to the future Codification Conference and stating that "although it is desirable that the Conference's decisions should be unanimous, and every effort should be made to obtain this result, it must be clearly understood that, where unanimity is impossible, the majority of the participating States, if disposed to accept as among themselves a rule to which some other States are not prepared to consent, cannot be prevented from doing so by the mere opposition of the minority" (*Official Journal of the League of Nations, Special Supplement No. 55*, p. 53). See also the observations on the question of unanimity at the third session of the Committee of Experts, 1927, *Minutes*, pp. 11, 12.

only of the various Governments, such as the Soviet Union[30] and Brazil,[31] represented on the Codification Committee of 1947. The British representative, who also acted as Rapporteur of the Committee, expressed himself with all requisite clarity: "I am not, as a matter of principle, opposed to codifying conventions. I think they are the ideal toward which we have to work. I merely think that at present codifying conventions which are worth having are impracticable. I think a concluded convention would be better and more satisfactory than a mere scientific restatement of the law which has no actual authority . . . Restatements are only a stage in the process, they are a way for preparing the ground for what we all hope we shall eventually reach—a comprehensive statement, an eventual codification of international law by international agreement."[32]

24. At the same time, the fact that the function of the Commission is not, in the first instance, synonymous with drafting instruments intended for immediate adoption as conventions, brings into relief the comprehensive character of its function both with regard to the method to be pursued and with regard to the field to be covered. The question of method, which—as already stated—cannot be confined to a mere registration of the existing law, is discussed in part III of this memorandum. The question of the field to be covered can best be approached by a survey of the entire field of international law as suggested in article 18 of the Statute of the Commission. Within that framework the selection of topics is no longer a matter of assigning decisive priority to some at the permanent expense of others. It is a question of evolving a long-range plan, on a systematic basis, for a scientific and legislative undertaking of a magnitude commensurate with the task of the United Nations as one of the principal agencies for the development of international law.

[30] See the statement of the representative of the Union of Soviet Socialist Republics on 22 May 1927: Doc. A/AC.10/32, p. 6. He warned against the danger of misleading "public opinion by inspiring an unjustified confidence that codification in the form of informal compilations is adequate, and that therefore remains nothing more to be done". He added: "The nations await the consolidation of legality in international relations. Legality demands precise legal forms."

[31] Statement of the representative of Brazil, on 19 May 1947: Doc. A/AC.10/28. He said: "Neither the codification nor the development of international law can be achieved merely by submission of learned opinions. They must take the form of resolutions by the General Assembly or of multilateral conventions."

[32] Doc. A/AC.10/35, pp. 3-4. In view of this it is not considered necessary in this Memorandum to discuss the question whether, as occasionally maintained, codification of international law by means of conventions is derogatory to the authority of customary international law and ought to be discouraged. For a recent statement of this view see the observations of M. Basdevant before the Institute of International Law in 1947: *Annuaire*, 1947, pp. 227-230.

PART II

A Survey of International Law in Relation to Codification

25. It is proposed to survey here in general outline "the whole field of international law" referred to in article 18 of the Statute of the International Law Commission, having regard to the task of the Commission as outlined in part I of this memorandum, to the previous efforts at codification, and to existing drafts, governmental and other. The list of topics which will be surveyed in this part is not intended to be exhaustive. Thus this memorandum does not attempt to cover fields already covered by existing international conventions such as those in the fields of air law or of international postal communications. Likewise, no attempt is made to survey subjects of private international law.

I. THE GENERAL PART OF INTERNATIONAL LAW

26. In so far as the function of the Commission embraces the eventual codification of international law as a whole, it will be necessary for it to consider whether it may not be incumbent upon it to attempt a formulation, in the form of draft articles, of what may be described as the general part of international law. Some of the great municipal codes contain introductory and general articles of this nature formulating the bases and the principles of the legal system as a whole—in particular with regard to the subjects of the law, its sources, and its relation to the various branches of the law. It is probable that, both for practical and doctrinal reasons, an authoritative statement of the law of this nature would be of considerable usefulness in the sphere of international law. This applies in particular to the following three questions: (1) the subjects of international law; (2) the sources of international law; (3) the relation of the law of nations to the municipal law of States. It is now proposed to consider these three questions in turn.

(1) *Subjects of International Law*

27. The question of the subjects of international law has, in particular in the last twenty-five years, ceased to be one of purely theoretical importance, and it is now probable that in some respects it requires authoritative international regulation. Practice has abandoned the doctrine that States are the exclusive subjects of international rights and duties. Although the Statute of the International Court of Justice adheres to the traditional view that only States can be parties to international proceedings, a number of other international instruments have recognized the procedural capacity of the individual. This was the case not only in the provisions of

the Treaty of Versailles relating to the jurisdiction of the Mixed Arbitral Tribunals, but also in other treaties such as the Polish-German Convention of 1922 relating to Upper Silesia in which—as was subsequently held by the Upper Silesian Mixed Tribunal—the independent procedural status of individuals as claimants before an international agency was recognized even as against the State of which they were nationals.

28. In the sphere of substantive law, the Permanent Court of International Justice recognized, in the advisory opinion relating to the postal service in Danzig, that there is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties. A considerable number of decisions of municipal courts rendered subsequently to the advisory opinion of the Permanent Court expressly affirmed that possibility.

29. In the field of customary international law the enjoyment of benefits of international law by individuals as a matter of right followed from the doctrine, accepted by a growing number of countries, that generally recognized rules of the law of nations form part of the law of the land. In the sphere of duties imposed by international law the principle that the obligations of international law bind individuals directly regardless of the law of their State and of any contrary order received from their superiors was proclaimed in the Charter annexed to the Agreement of 8 August 1945, providing for the setting up of the International Military Tribunal at Nürnberg, as well as in the Charter of the International Military Tribunal at Tokyo of 19 January 1946. That principle was fully affirmed in the judgment of the Nürnberg Tribunal as flowing from the imperative necessity of making international law effective. The Tribunal said: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." It was reaffirmed in the resolution of the General Assembly of 11 December 1946, expressing adherence to the principles of the Nürnberg Charter and Judgment. It has loomed large in the discussions and statements bearing upon the resolution of the General Assembly in the matter of the codification of the law applied in the judgment of the International Military Tribunal. The General Assembly directed the Committee on Codification of International Law "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal". In a memorandum submitted by the representative of France to the Codification Committee in 1947 it was proposed that the general principle enunciated by the Tribunal and cited above should be confirmed as part of the codification of this aspect of the law: "The individual is subject to international penal law. Without thereby excluding the penal responsibility

of the criminal State, international penal law can inflict penal
authors of international offences and their accomplices."[33]

30. On a different plane the Charter of the Nürnberg Tribunal—and the judgment which followed it—proclaimed the criminality of offences against humanity, i.e., of such offences against the fundamental rights of man to life and liberty, even if committed in obedience to the law of the State. To that extent, in a different sphere, positive law has recognized the individual as endowed, under international law, with rights the violation of which is a criminal act. The repeated provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms are directly relevant in this connexion.

31. Finally, account must be taken of the developments in modern international law amounting to a recognition of the international personality of public bodies other than States. The international legal personality of the United Nations, of the specialized agencies established under its ægis, and of other international organizations, call for a re-definition of the traditional rule of international law in the matter of its subjects. That legal personality is no longer a postulate of scientific doctrine. It is accompanied by a recognized contractual capacity in the international sphere and, as with regard to the right to request an advisory opinion of the International Court of Justice, by a distinct measure of international procedural capacity.

32. All these developments may be considered as rendering necessary, within the orbit of the codification of the general part of international law, the clarification and revision of some of the traditional notions. Such clarification and revision would do no more than give expression both to actual changes in the law and to the changing conditions of international society which no longer permit the maintenance of what, in the view of many, is becoming a fiction obstructive of progress. Previous efforts at codification have touched only the fringe of the question. Thus the League of Nations Committee of Experts for the Progressive Codification of International Law discussed in some detail draft rules for formulating, by way of an international convention, international provisions concerning the nationality of commercial corporations and for the recognition of the legal personality of foreign commercial corporations.[34] At its fourth session in 1927 the Committee had before it a report on the legal position of private non-profit-making international associations and of private international foundations.[35] In the Project of the American Institute of International Law on Fundamental Bases of International Law, article 2 provided, somewhat tentatively, as follows:

"In addition to those matters which heretofore have come within the domain of international law, there belong other new matters arising out of

[33] A/AC.10/34.

[34] *Minutes of the Third Session*, 1927, pp. 57-63, 64-68.

[35] *Minutes of the Fourth Session*, 1927, p. 49.

the exigencies of modern social life, as well as the international rights of individuals, namely, the rights which natural or juridical persons can invoke in each nation in the cases expressly provided for in the convention on this subject."[36]

(2) *Sources of International Law*

33. The codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in article 38 of the Statute of the International Court of Justice. That definition has been repeatedly treated as authoritative by international arbitral tribunals. It is doubtful whether any useful purposes would be served by attempts to make it more specific, as, for instance, by defining the conditions of the creation and of the continued validity of international arbitral tribunals. It is doubtful whether any useful purpose the general principles of law which article 38 of the Statute recognizes as one of the three principal sources of the law to be applied by the Court. The inclusion of a definition of sources of international law within any general scheme of codification would serve the requirements of systematic symmetry as distinguished from any pressing practical need. A distinct element of usefulness might, however, attach to any commentary accompanying the definition and assembling the experience of the International Court of Justice and of other international tribunals in the application of the various sources of international law. It may be noted that Project No. 4, prepared by the American Institute of International Law, on the "Fundamental Bases of International Law", is devoted almost exclusively to the various aspects of sources of international law.[37]

(3) *The Obligations of International Law in relation to the Law of the State*

34. It must be a matter for consideration to what extent and in what detail the obligation of States to give effect, through their national law, to their duties arising out of international law should find a place in any general scheme of codification. The problem is one which is closely related to the authority and the effectiveness of international law. To a large extent it is a question of the reaffirmation of what has now become a prominent feature of the law and of the practice of many States. The doctrine of incorporation, according to which the principle that the rules of international law form part of the municipal law of States, originated in England and in the United States. However, this is not now a doctrine confined to those countries. It has been adopted by other States, for instance in the German Constitution of 1919 or in the Constitutions of

[36] Project No. 4; *American Journal of International Law*, Special Number 20 (1926), p. 304.

[37] *American Journal of International Law*, Special Number 20 (1926), pp. 304-307.

Argentina and Venezuela. The preamble to the French Constitution of 1946 contains a general declaration to the effect that France conforms to the principles of public international law. The courts of many other countries, the constitution of which does not expressly include the principle of incorporation, have acted upon it. The time would therefore appear ripe for the incorporation of the principle, suitably elaborated and defined, that treaties validly concluded by the State and generally recognized rules of customary international law form part of the domestic law of the State; that courts and other national agencies are obliged to give effect to them; that they cannot be unilaterally abrogated by purely national action; and that a State cannot invoke the absence of the requisite national laws and organs as a reason for the non-fulfilment of its international obligations.

35. Admittedly a codification, on these lines, of this fundamental aspect of international law will raise difficult questions of constitutional law in various States, and the question will arise whether this is a suitable subject within the general scheme of codification. Thus in England treaties ratified by the Crown but affecting private rights are not enforced by the courts unless they are followed by an enabling Act of Parliament (though this difficulty has tended to disappear in view of the recent practice of submitting treaties for parliamentary approval, coupled with an enabling Act, prior to the ratification of the treaty). Similarly, in the United States though treaties ratified with the consent and advice of the Senate constitute the supreme law of the land, abrogating any law inconsistent with the terms of the treaties, a subsequent Act of Congress will be acted upon by the courts though its provisions may be inconsistent with the terms of a treaty binding upon the United States. These and similar problems bring to mind the difficulties of this aspect of codification. However, it is significant that it has formed the subject-matter of some previous efforts in this direction. Thus, for instance, article 3 of Project No. 4 adopted in 1925 by the American Institute of International Law—one of the series of "projects of conventions for the preparation of a code of public international law"—on Fundamental Bases of International Law provides that "international law forms a part of the national law of every country" and that "in matters which pertain to it, it should therefore be applied by the national authorities as the law of the land".[38] Article 4 laid down that "national laws should not contain provisions contrary to international law". Similar provisions were incorporated in articles 2 and 3 of Project No. 1 (Fundamental Bases of International Law) submitted in 1927 by the International Commission of Jurists for the consideration of the Sixth International Conference of American States.[39] In the jurisprudence of international tribunals the principle of the supremacy of international obligations over national law has found repeated expression—as, for instance, in Advisory Opinion No. 17 (Greece

[38] *Loc. cit.*, p. 304.

[39] *American Journal of International Law*, Vol. 22, No. 1 (1928), Special Supplement, p. 238.

and Bulgaria, "Communities" case) where the Court laid down that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (Series B, No. 17, at p. 32).

36. In this connexion attention may be directed towards international regulation, in the general scheme of codification, of the application of international law in Federal States. A great—and probably growing—part of the world is organized on a federal basis. The growth of the scope of multilateral treaties has revealed the complexities of the situations arising out of the fact that the effective treaty-making power of Federal States—and, as the result, the efficacy of international treaties—may be reduced by the fact that questions forming the subject-matter of these treaties fall within the province of the member States of Federal States. The constitution, recently revised, of the International Labour Organisation has accommodated the functioning of the Organisation to that fact. Courts of various countries have, by reference to the peculiarities of the constitutions of the countries concerned, adopted divergent attitudes on the subject—as may be seen, for instance, from the decisions of the Judicial Committee of the Privy Council with regard to certain international labour conventions concluded by Canada and the decisions of the Supreme Court of Canada in the matter of the International Air Navigation Convention of 1919. Some decisions of the Supreme Court of the United States—such as *Missouri* v. *Holland* (1920), 252 U.S. 416, *U.S.* v. *Pink* (1942), 315 U.S. 203, and *Hines* v. *Davidowitz* (1941), 312 U.S. 52—have drawn attention to the impact of the federal structure of States on their capacity to fulfil the obligations of international law. The time may be ripe for considering this question within the framework of the codification of the general principles, the "fundamental bases", of international law. It will be noted that the French representative on the Codification Committee in 1947 proposed, in connexion with the codification of the principles of the Nürnberg Charter and Judgment, "confirming the supremacy of international law over municipal law in the international penal sphere".[40]

II. STATES IN INTERNATIONAL LAW

37. Sovereign and independent States are the principal—though not exclusive—subjects of international law. A systematic exposition of international law, whether in the form of a code or otherwise, must therefore be concerned, in the first instance, with three aspects of independent statehood. The first is a general formulation of the principal—the "fundamental"—rights and duties of States; the second refers to the rules and principles governing the formal or substantive commencement of statehood—the subject of recognition; the third refers to questions arising out of changes in

[40] A/AC.10/34, p. 3.

the personality and territorial composition of States—the subject usually referred to as State succession. While the question of fundamental rights and duties of States has loomed large in the official efforts at codification, this has not been the case with regard to recognition and succession of States and Governments.

(1) *Fundamental Rights and Duties of States*

38. This subject will be under special consideration by the International Law Commission by virtue of a separate resolution of the General Assembly, and it is therefore not considered necessary to comment upon it in this context except in two respects. In the first instance, it is assumed that the Declaration—or some similar instrument—would be drafted and adopted as part of what may in the future become a comprehensive codification of international law and that, therefore, the Declaration would not cover, except by way of a general statement of principle, other branches of international law such as the law of treaties or of State responsibility. Secondly, the Declaration on Fundamental Rights and Duties of States will necessarily include rules and principles which would not normally be covered by any specific topic of international law, such as the prohibition of intervention or the affirmation of the right of self-preservation and self-defence.

39. With regard to these questions it is probable that the codification of the relevant principles of international law will not reach the required degree of usefulness unless it goes beyond a general enunciation of principles. Thus the principle of prohibition of intervention may have to be accompanied, if it is to be complete and authoritative, by an elaboration of the exceptions which are generally considered as rendering intervention legal and permissible. Similarly, with regard to the prohibition of that category of intervention which, as occasionally asserted, assumes the form of revolutionary propaganda, a codification, properly conceived, of the relevant rules of international law would have to take into consideration the difference between revolutionary propaganda by governmental agencies and by private persons and bodies. With regard to the latter, rules would have to be considered for defining the responsibility of the State for such revolutionary activities and propaganda against foreign States as emanate from non-governmental bodies in receipt of governmental support or actually directed by persons in governmental service. With regard to the enunciation of the right of self-preservation and self-defence, a purely general rule would be lacking in authority unless it were coupled with the clear recognition of the principle that while the State concerned is, in the first instance, the sole judge of its right to have recourse to action in self-preservation or self-defence, the ultimate determination of the legal justification of such action must be within the competence of an impartial international authority. Codification, like written law in general, cannot envisage and deal with all the possible contingencies which

may arise. A proper degree of generality is of the essence of the law. But its purpose is defeated when the general statement of a legal principle assumes the form of an abstract pronouncement disregarding possibilities and situations which experience has shown to be typical. For this reason instruments such as the Convention on Rights and Duties of States adopted in 1933 by the Seventh Conference of American States, while providing a useful contribution to any future codification of this aspect of international law, must probably be regarded as a starting point rather than a consummation of the work of codification in this respect.

(2) *Recognition of States*

40. The question of recognition of States—alongside that of recognition of Governments and belligerency—is, from the practical point of view, one of the most important questions of international law. Yet no attempt has so far been made to include it, on an adequate scale, as part of the work of codification. The League of Nations Committee of Experts devoted a brief discussion to the subject in so far as it is connected with the form of recognition of Governments and the international position of Governments which have not been formally recognized. The great majority of the Committee experienced little hesitation in removing the question from its agenda. The representative of Great Britain urged that the Committee should "refuse to discuss this question of all others, since the regulation of it by means of international conventions was neither realizable nor desirable . . . The difficulties arising from it and the delicacy of the question were well known, and, from a legal point of view, it was a subject which neither could nor ought to be treated juridically. To take an analogy, it was as though a State passed a law regulating the choice of friends to be adopted by its citizens. Such a law, if passed, would be null and void at the outset, and the same was true of a regulation of international relations." [41] The French representative fully concurred in that view: "The recognition of a Government was not a matter which could be legally regulated. It was entirely a political question."[42] This was also the view of most of the members of the Committee. On the other hand, the representative of Argentina stated "definitely that the question was an urgent one, that it had been put aside for political reasons, and that he personally would have desired to see it investigated". He urged that "if international relations were to be subordinated to political interest and not to sound legal principle, progress would be slow".[43] The Committee did not consider other aspects of recognition.

41. In the projects prepared in 1927 by the International Commission of Jurists in America the question of recognition appeared, in a somewhat general way, in five articles of Project No. 2 entitled "States. Existence—

[41] *Minutes of the First Session*, 1925, pp. 39-40.
[42] *Ibid.*, p. 40.
[43] *Ibid.*, p. 40.

Equality—Recognition". It figured also in two articles of the Convention on Rights and Duties of States adopted in 1933 by the Seventh International Conference of American States. The question of recognition was also the subject of a resolution of the Institute of International Law in 1936[44]—a fact suggesting that the matter is not as incapable of legal regulation as the Committee of Experts tended to assume. It is understood that the Harvard Research had under consideration the subject of recognition with the view to including it among the research Drafts; that valuable preparatory work was done; but that it was not possible to register sufficient progress for the production of a Draft Convention.

42. The main reason for the inability—or reluctance—to extend the attempts at codification to what is one of the central and most frequently recurring aspects of international law and relations has been the widely held view that questions of recognition pertain to the province of politics rather than of law. There are many who believe that that view is contrary to the evidence of international practice—governmental and judicial—and that if acted upon it is probably inconsistent with the authority of international law and its effectiveness in one of the most crucial manifestations of the international relations of States. It would seem inconsistent with the authority of international law that the question of the rise of statehood and the capacity of States to participate in international intercourse should be regarded as a matter of arbitrary discretion rather than legal duty. It must therefore be a matter for consideration whether that vast problem ought to remain outside the codifying task of the International Law Commission. There is an imposing body of practice and doctrine making feasible the attempt at formulating and answering, as a matter of international law, such questions as the requirements of statehood entitling a community to recognition; the legal effects of recognition (or of non-recognition) with regard to such matters as jurisdictional immunity, State succession, diplomatic intercourse; the admissibility and effect, if any, of conditional recognition; the question of the retroactive effect of recognition; the modes of implied recognition; the differing legal effects of recognition *de facto* and *de jure;* the legal consequences of the doctrine and practice of non-recognition; and last—but not least—the province of collective recognition.

43. Most of these problems are also germane to the question of recognition of Governments which, from the practical point of view, seems to be even more urgent than that of recognition of States. In relation to codification the position in this respect would seem to be more favourable than in the matter of recognition of States, for, unlike in the latter case, the majority of writers consider that the question of recognition of Governments is regulated by rules of international law. Similar considerations apply to the question of recognition of belligerency.

[44] *American Journal of International Law*, 30 (1936). Suppl., p. 185.

(3) *Succession of States and Governments*

41. The question of State succession—even more than that of recognition—has so far remained outside the work of codification. One possible explanation of this fact is that State succession has often been regarded as a problem arising primarily as the result of war and that as such it ought, like the law of war itself, to remain outside the field of codification. This view is open to question. Experience has demonstrated that changes of sovereignty may take place in ways other than the liquidation of the aftermath of war—as has been shown, for instance, by the questions of State succession which have arisen as the result of the emergence of the independent States of India and Pakistan.

45. However that may be, it would seem desirable, in the first instance, to consider the possibility of giving a precise formulation to what has now become a generally recognised principle of law on the subject, namely, that of respect for acquired private rights. That principle has never been seriously challenged. It has been given frequent and authoritative judicial recognition. The Permanent Court of International Justice affirmed it emphatically with regard to what many considered as the borderline case of private rights of political origin created with a view to destroying cultural and economic values identified with the very being of the successor State. Yet while the principle of respect for private rights forms part of international law, there is no adequate measure of certainty with regard to its application to the various categories of private rights such as those grounded in the public debt, in concessionary contracts, in relations of government service, and the like. Arbitral practice has occasionally affirmed exceptions to the general principle, as, for instance, with regard to the obligations of the predecessor State in the matter of tort. But these exceptions do not necessarily follow a general principle of law, and their validity has been challenged. Similarly, the exception with regard to the public debt contracted for purposes inimical to the successor State may require clarification.

46. While there has been agreement as to the general principle of respect for private rights, the position with regard to rights and obligations arising out of the treaties concluded by the predecessor State is in many respects obscure. There may be room for the view that with regard to situations in the matter both of private rights and of treaty obligations the regulation of the questions involved can more conveniently take place by agreement between the States concerned. On the other hand, international arbitral practice has shown that problems of State succession may arise even when there exist treaties bearing on the subject; that it cannot reasonably be expected that treaties will deal with the whole range of problems which may arise in this connexion; and that provision must be made for the contingency of there being no treaty at all. Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not

be left out of account. The law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power. As such it would seem to deserve more attention in the scheme of codification than has been the case hitherto. The League of Nations Committee of Experts left the question on one side. One member of the Committee did not think that "it would be practicable or desirable and realizable to regulate questions of private, fiscal or administrative law connected with the succession of States. These were problems in which political considerations took precedence of legal considerations."[45]

47. In connexion with State succession it may also be considered to what extent that aspect of codification ought to concern itself (*a*) with so-called succession of Governments, i.e., of the rights and obligations of a Government which has been successful in a civil war with respect to rights and obligations of the defeated *de facto* Government; and (*b*) with the affirmation of the principle, which is well recognized, that the obligations of the State continue notwithstanding any changes of government or of the form of government of the State in question. Any attempt to codify the rules governing the latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. It is clear that any attempt to formulate the principles—and their qualifications—in question would raise problems of great legal and political complexity. However, this need not necessarily constitute a decisive argument against including it within the scheme of codification.

III. JURISDICTION OF STATES

(1) *Recognition of Acts of Foreign States*

48. The obligation of States to give effect—to recognize—through their courts and other organs the legislative, judicial and, to some extent, administrative acts of foreign States and private rights acquired thereunder is occasionally described as following from the principles of independence or equality, or both. It is said that it would be inconsistent with the independence—or equality—of States if the organs of one State were to constitute themselves judges of the legal validity of the legislative, judicial or administrative acts of another State and if they were to refuse to recognize private rights grounded in such acts. Thus conceived, the question of the recognition of acts of foreign States is one of public international law. On the other hand, it is generally acknowledged that the extent to which private rights acquired under foreign law must be recognized is one of private international law. It must also be borne in mind that the question has seldom

[45] M. [illegible] at the first session, 1925; *Minutes*, p. 14.

formed the subject-matter of protests or representations, as a matter of international law, by one State against another.[46] Courts have often referred to it as one of international "comity"—though it is not always clear whether such terminology is due to a somewhat lax use of language or to a considered view that these are not matters within the province of public international law. In this connexion it may be a matter for consideration whether the question of judicial assistance ought to be examined by the International Law Commission as a subject for codification in the context of the present section or whether it ought not to come, more suitably, within the orbit of "development" of international law. That question was among the topics discussed by the League of Nations Committee of Experts; it formed the subject matter of a draft convention and a scholarly commentary prepared by the Harvard Research.

49. These conflicting considerations are relevant to the question whether the problem of recognition of legislative, judicial, and administrative acts of foreign States should form part of the codifying effort of the International Law Commission. There may be weighty reasons of international economic stability and orderly intercourse counselling an international regulation of the subject. Account would also have to be taken of the fact that, quite apart from considerations of *ordre public* of various States setting a limit to the recognition of foreign laws and judgments, international practice has evolved other limitations upon the duty, if any, of giving effect to emanations of foreign sovereignty. Thus the right of a State to recognition of the effects of its jurisdiction is rigidly limited by the right of other States not to permit the exercise of foreign jurisdiction within their territory. This explains the refusal of most States to give effect to foreign penal or confiscatory laws and decrees or to enforce foreign revenue laws. The problem involves the intricate question of the recognition of foreign decrees intended to have extra-territorial effect. It is also germane to the limits of the duty of a State to recognize the nationality laws of other States. While that duty is generally admitted, it does not, as may be seen from the Hague Convention of 1930 on Certain Questions of Conflict of Nationality Laws, extend to nationality conferred in disregard of international law or of general principles of law.

(2) *Jurisdiction over Foreign States*

50. This is a subject with regard to which the municipal jurisprudence of States has produced material more abundant than in any other branch of international law. It covers the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of

[46] For an example of such representations see the British complaint to Peru, in 1862, with regard to the refusal of Peruvian courts to recognize the courts of the place of domicile to try the question of the validity of a will, at least so far as personal property is concerned (*State Papers*, 1864, Vol. 64, No. 31, p. 80). And see Niboyet in *Recueil des Cours de l'Académie de droit international*, 40 (1932) (ii), pp. 153-177.

their armed forces. Its importance in the sphere of international relations is only inadequately reflected in the fact that it has seldom given rise to representations made by one State to another or, as in the *Casa Blanca* case decided in 1909 under the ægis of the Permanent Court of Arbitration, to international arbitral pronouncement. The same applies to the circumstance that occasionally judges describe the obligation to grant jurisdictional immunity as flowing from international "comity". The principle that these obligations of States are grounded in the overriding legal duty to respect the independence and equal status of States is generally recognized. This underlying general agreement explains why, notwithstanding the divergencies in detail, the Committee of Experts was of the view that some of the aspects of this subject were ripe for codification and could be considered by an international conference convened for that purpose.[47] In reply to the questionnaire sent out by the Committee, twenty-one Governments had previously expressed themselves in favour of the codification of this subject; only three States answered in the negative.

51. The Draft Convention of the Harvard Research on the Competence of Courts in regard to foreign States constitutes a comprehensive attempt at the codification of this branch of the law in most of its aspects—substantive and procedural—including the position of foreign States as plaintiffs. It contains, in addition, a detailed discussion, against the background of an instructive documentation, of the methods of asserting immunity and of the question of enforcement of judgments given in proceedings conducted with the assent of the foreign States concerned. It does not include a treatment of the position of men-of-war and of armed forces in foreign territory. The Brussels Convention of 1926 on the immunity of State-owned ships and cargoes in time of peace provides an instructive example of the regulation of a limited portion of the subject.

52. There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States. This applies in particular to that aspect of jurisdictional immunities which arises out of the increase in the economic activities of the State. Thus while in 1926 the Supreme Court of the United States held—in *Berizzi*

[47] For a discussion of the subject by the Committee of Experts see *Minutes of the Fourth Session*, 1928, pp. 22, 23.

Brothers v. *Steamship Pesaro* (271 U.S. 562)—that a vessel owned by a foreign State and engaged in ordinary commercial activities is entitled to jurisdictional immunities, much authoritative doubt as to the meaning and effect of that decision was expressed in a case decided in 1945 where Mr. Justice Frankfurter, in a concurring opinion, expressed the view that the result in *Berizzi Brothers* v. *Steamship Pesaro* "was reached without submission by the Department of State of its relevant policies in the conduct of our foreign relations and largely on the basis of considerations which have steadily lost whatever validity they may then have had" (*Republic of Mexico* v. *Hoffman* (1945), 324 U.S. 30).[48] Similarly, while in Great Britain it had been assumed for a long time that the nature of the activity of a foreign Governmental vessel is irrelevant for the question of jurisdictional immunity—a principle emphatically though regretfully reaffirmed in 1920[49]—in a more recent decision members of the highest English tribunal expressed doubts whether, having regard to the changed character of international economic activities, the established rule could continue to be applicable.[50] The divergencies of view on the subject as between various countries may be gauged from the fact that while Italian courts have held that a contract for the purchase of shoes for the army is an act of a private law nature and as such outside the principle of immunity,[51] in the United States the same transaction was held to constitute the "highest sovereign function of protecting itself against the enemies".[52] In the course of the discussion of the subject before the League of Nations Committee of Experts the French representative pointed out that "the situation became rather doubtful when it was a question of dealing with commercial operations affecting the very existence of the State. A State which engaged in commercial operations would of course be regarded as a private individual, but when that State was engaged in transactions affecting the very existence of the nation the situation was not quite the same."[53]

53. It is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law commanding the agreement of a vast majority of nations on this matter. This applies not only to questions of detail on such matters as counter-claim, set-off and various forms of waiver—on all these questions there are occasional divergencies of practice—but also with regard to what is perhaps the central issue in this connexion, namely, immunity with regard to State transactions and activities of a commercial and similar character as well as with

[48] In the internal sphere the Supreme Court, in *State of New York and Saratoga Springs Commission* v. *The United States of America* (1946, U.S. Law Week 4089), followed the same tendency in holding that a State which sells liquor, even in the exercise of the police power, is amenable to the Federal taxing power.

[49] In *The Porto Alexandre*, 1920, p. 30.

[50] *The Cristina*, 1938 A.C. 845.

[51] *Governo Rumeno* v. *Trutta*, *Giurisprudenza Italiana*, 1926, I (i), 774.

[52] *Kingdom of Roumania* v. *Guaranty Trust Co. of New York* (2nd) 250 Fed. 341, 343

[53] *Minutes of the Fourth Session*, 1928, p. 23.

regard to such transactions and activities of bodies possessing a personality separate from that of the State but in fact acting as an agency of the State. The indications of a change of attitude in the highest tribunals of countries such as the United States and Great Britain show that the obtaining divergencies are not grounded in such fundamental conceptions of national jurisprudence as to preclude a statement of the law commanding general agreement. Reference may also be made in this connexion to the changing conceptions of legislative practice in the matter of the immunities of the State's own organs before their courts, as shown by the British Crown Proceedings Act, 1948, and the United States Tort Claims Act, 1946. States may be less inclined to grant jurisdictional immunity to other States at a time when they submit their own agencies to the incidence of legal liability. This factor may act as a reminder of the tendency, which will unavoidably confront those engaged in the task of codifying this aspect of international law, to limit jurisdictional immunities of States not only with regard to activities *jure gestionis* but also in general.

54. While, for various reasons, the question of diplomatic and consular immunities will probably require separate treatment, it may be found convenient to include in the effort to codify this branch of the law the immunities of the Head of the State as well as those of men-of-war and of the armed forces of the State. With regard to the latter, recent decisions of national tribunals have shown that the wide acceptance of the general principle of immunity covers divergencies of practice which amount to a large extent to a denial of the principle of immunity as such. This was clearly shown by the decision, rendered in 1943, of the Canadian Supreme Court,[84] in which various judges expressed diametrically opposed views on the subject, and in the series of decisions given during the Second World War by Egyptian courts. These decisions suggest also that a bilateral regulation of a subject by the States concerned does not necessarily do away with the necessity of interpreting it against the background of customary international law and of general international treaties of a legislative and codifying character.

55. In this connexion reference may also be made to the necessity of making precise and uniform the rules relating to the jurisdictional immunities of not fully sovereign States such as protectorates or member States of Federal States. Here, too, practice has not tended to uniformity.

56. Finally, consideration will probably have to be given to the desirability and feasibility of removing a source of uncertainty and occasional friction resulting from the divergencies of method by which municipal courts take cognizance of the existence of the right to jurisdictional immunity. In many, but not all, countries the courts have relied for that purpose on the statement of the executive branch of the Government, which they have

[84] [1943] 4 D.L.R. 11; S.C.R. 483.

treated as conclusive. So long as such statements of the Executive—given in the form of a certificate, or "suggestion", or in other ways—are based on an impartial ascertainment, by expert officials, of the legal position and of the status of the foreign Governments or persons concerned, they probably do not amount to an undue interference with the function of the judiciary applying international law as part of the law of the land. The same applies, to some extent, to the question of the weight attached by courts to the statements and declarations of the representatives of the foreign State concerned with regard to the issues of fact and law raised by actions brought before courts. However, in this field, too, the practice has not been uniform and consideration may be given to the necessity of clarifying the existing practice.

(3) *Obligations of Territorial Jurisdiction*

57. A general statement of the duties of States arising out of the fact that they exercise jurisdiction within their territory—their territorial sovereignty—can suitably find a place in the Declaration of Rights and Duties of States (which, it may be hoped, will eventually be incorporated within the general scheme of codification as the introductory and basic exposition of the part of international law relating to States). However, in addition to a general statement of that nature, it must be a matter for consideration whether there is not required a "formulation and systematization" of rules of international law bearing upon the obligations of territorial sovereignty in the interest of orderly neighbourly intercourse and relations. There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law. This rule has been applied, in particular, with regard to the duty of States to prevent hostile expeditions against the territory of their neighbours. The relevant rules of law have found frequent expression in the Foreign Enlistment Acts of the United States and Great Britain; they have also been embodied in the criminal legislation of a number of other States. Some of the main aspects of this part of international law have found expression in the Convention on Duties and Rights of States in the Event of Civil Strife incorporated in 1928 in the Final Act of the Sixth International Conference of American States and subsequently ratified by a number of countries.

58. In the same category of duties grounded in the exclusive jurisdiction of States over their territory may be considered the obligation of the State to prevent its territory from causing economic injury to neighbouring territory in a manner not permitted by international law. The award in the *Trail Smelter Arbitration* case—in which it was held that a State is responsible for injury done to the neighbouring territory by noxious fumes emanating from works operated within the State—provides an instructive example of this category of duties. They include a great deal of what is known in the

common law countries as the law of nuisance. They comprise the obligation to take measures both of a preventive nature and of active co-operation with other States against the spread of disease and epidemics. They cover the duties of States with regard to the use of the flow of international and non-national rivers in such matters as the pollution of and interference with the flow of rivers. A substantial body of diplomatic correspondence, judicial practice and doctrine has grown around this subject, which is of considerable economic importance and urgency. Unless the law relating thereto is codified in connexion with the law bearing upon international rivers as such, its proper place would appear to be in connexion with the codification of the law arising from the obligations of territorial jurisdiction.

59. That branch of the codified law would also suitably regulate the following two other matters: The first refers to the obligation of States to refrain from performing jurisdictional acts within the territory of other States except by virtue of a general or special permission. Such acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime. The second bears upon the question of the duty of courts to refrain from exercising jurisdiction over persons apprehended in violation of the territorial sovereignty of other States or, generally, in violation of international law. The existence of any such duty has been denied by the courts of some States, e.g., of the United States; it has been affirmed by the courts of other States, e.g., of France. In the *Savarkar* case between Great Britain and France decided in 1911, a Tribunal of the Permanent Court of Arbitration did not accede to the view that a country which has irregularly apprehended a suspected criminal in a foreign country is under an obligation to return the fugitive to the country where he had been apprehended in a manner inconsistent with existing treaties.

60. The questions enumerated in this section—the law of hostile expeditions, obligations in case of a civil war, injurious economic use of territory, the law of nuisance, improper interference with the flow of rivers, exercise of jurisdictional acts within foreign territory, and jurisdiction of courts with regard to persons apprehended in violation of foreign sovereignty—seem to represent an unconnected series of questions. In reality, they form part of one aspect of international law as to which there exists already a substantial body of practice and which is probably in need of clarification in the interest of peace and of neighbourly intercourse of States.

(4) *Jurisdiction with regard to Crimes Committed outside National Territory*

61. The typical question of the jurisdiction of States with regard to offences committed outside their territory is that associated with their jurisdiction over offences committed abroad by aliens. The right of a State to

try its own nationals for offences committed abroad is not at issue. It has received authoritative confirmation on the part of national tribunals of many countries. With regard to offences committed or alleged to have been committed by aliens, the subject, though of limited compass, is one which by general admission requires clarification and authoritative solution. It is doubtful whether such final solution has been achieved—or perhaps attempted—by the judgment of the Permanent Court of International Justice in the case of *The Lotus*. In that case the Court by a bare majority—by the casting vote of its President—held that there was no rule of international law to prevent a State from exercising jurisdiction over aliens with regard to crimes committed abroad. It is possible that, to some extent, the decision of the Court must be read in the light of the special circumstances of the case, namely, of the fact that in one part of its judgment the Court treated the offence as having in fact been committed on the territory of the State which had assumed jurisdiction. In so far as the judgment of the Court purports to express a general and unqualified proposition of international law, it has been subjected to criticism and is unlikely to secure general acceptance. In 1937 a Convention concluded in Paris under the auspices of the International Maritime Committee provided, for the case of collisions, that the master, or any other person in the service of the ship, can be prosecuted only before the courts of the flag of the vessel and that no arrest or detention of the vessel can be ordered by any other authority. The League of Nations Committee of Experts considered this question and, after receiving a learned report on the subject, decided, in accordance with the recommendations of the Report, that the subject was not "ripe" for codification. The reason underlying the recommendations of the Rapporteur and of the decision of the Committee was that, in view of the diversity of national systems on the subject, "the international regulation of this question by way of a general convention, although desirable, would encounter grave political and other obstacles" (report of 26 January 1926).

62. It is not certain to what extent the reasons which moved the Committee of Experts to abandon this subject as not being ripe for codification are relevant to the function of the International Law Commission in the matter. Unlike the Committee of Experts, the Commission is not under an obligation to consider the matter from the point of view of its suitability to form the subject matter of a convention to be adopted by a conference to be convened in the immediate future. The Commission may, in the circumstances of the case, be satisfied with the adoption of a draft stating the more generally accepted and the most acceptable rule of law; it may be content with publishing it or with mere submission of it to the General Assembly for the purpose of being noted or approved without the taking of further action. Neither is it certain to what extent the Commission would feel impelled to attach decisive importance to the existence of any fundamental differences of national jurisprudence on the subject. It may attach greater importance to the fact that such differences as there exist do not disclose an underlying clash of national interests or significance. It may

note the fact that such national differences may be of a transient character. Thus, for instance, the British House of Lords in the case of *Joyce* v. *Director of Public Prosecutions* declined to recognize the unqualified validity of the rule that in no case can a State assume jurisdiction over an alien for an offence committed abroad. The House of Lords pointed out that having regard to modern developments in the field of communications, adherence to the strict rules of territoriality may lead to results of some absurdity. The Lord Chancellor, in giving judgment, said:

"It would, I think, be strangely inconsistent with the robust and vigorous common-sense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even [more] distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity."[55]

But English law has often been regarded as firmly wedded to the doctrine of territoriality. In dealing with this subject the Commission may wish to attach importance to the fact that, in a world in which distances have shrunk so considerably, the doctrine of territoriality has become capable of modification in many directions.

63. As stated above, the question of the jurisdiction of States in the matter of offences committed by aliens abroad is of limited compass, and it is arguable that, in any scheme of codification, it ought to figure merely as a subdivision of a larger topic such as "Obligations and Limitations of Territorial Jurisdiction". At the same time it would appear to be a question of considerable practical importance. States have shown themselves particularly sensitive to other States assuming jurisdiction over their nationals for crimes committed abroad. The subject was regulated in the Havana Convention of 1928 (the so-called Bustamante Code) and in some previous American treaties; it was covered by the resolutions of the Institute of International Law of 1883 and 1931; and it was studied at a series of international congresses of comparative and penal law. It was among the topics dealt with by the Harvard Research which resulted in a Draft Convention of great value. The controversial nature of the principal article in the Draft Convention[56] serves as a reminder that the subject is not free from difficulty, but the following passage from the Introduction to this Convention of the Harvard Research may usefully be quoted as being relevant not only to the particular question dealt with in the Convention, but—probably—to many other potential topics of codification.

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[55] [1946] A. C. at p. 369.

[56] Article 7 of the Convention provides that "A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed." Yet States are not in the habit of penalizing acts prejudicial to the safety of other States except in the case of active participation in hostile expeditions. Probably the more satisfactory test is whether such acts constitute an injury to the State or its citizens sufficiently serious to be so treated by an impartial judicial agency.

"The investigation indicates that states have much more in common with espect of penal jurisdiction than is generally appreciated, that the gulf etween those states which stress traditionally the territorial principle and ie states which make an extensive use of other principles is by no means s wide as has been generally assumed, that there are other practicable bases f compromise, without sacrifice of any essential state interest, on most if ot all of the controverted questions, and that it is feasible to attempt a efinition of penal jurisdiction in a carefully integrated instrument which ombines recognition of the jurisdiction asserted by most states in their gislation and jurisprudence with such limitations and safeguards as may be lculated to make broad definitions of competence acceptable to all."[57]

(5) *The Territorial Domain of States*

64. The law relating to State territory has remained almost entirely outde the efforts at codification. There have been occasional multilateral eclarations and instruments relating to boundaries and acquisition of tertorial sovereignty, such as the General Act of the Berlin Congo Conference 1885 on notification of future occupations on the African coast; the peated affirmation by the American States relating to the non-recognition acquisition of territorial sovereignty by force; the declarations bearing on ie Latin-American doctrine of *post-liminii;* and, more important, Projects os. 10 and 11 of the American Institute of International Law which cover, spectively, the question of territorial boundaries and "rights and duties of ations in territories in dispute on the question of boundaries".[58] But, herwise, the subject has remained untouched by the codification movement. The reasons for that fact are perhaps not difficult to explain. The lient aspect of this part of international law lies in the rules relating to the iginal acquisition of territorial sovereignty by discovery, occupation, conuest and prescription. Rights and claims to territory have been traditionly regarded as synonymous with the most vital interests of States, and it is erhaps not surprising that there has been a reluctance to cast the applicble rules of law in the form of codified principles which might be invoked mediately, with some eagerness, by parties to pending disputes. This has en so in particular in view of the fact that throughout the last century a mber of territorial disputes, still unresolved, have been pending and that ie adoption of any rules would, in many cases, have run counter to the terests or views propounded by the parties to existing controversies. The servation, in the optional clauses of Article 36 of the Statute of the ourt, relating to so-called past disputes has been largely due to the disinination to submit territorial disputes to compulsory judicial settlement. et, next to claims in respect of the treatment of aliens, territorial disputes ive figured most prominently before international arbitrators and tribunals, and there has been as a result an accumulation of a substantial nount of law on the subject. International awards and decisions—as

[57] Supplement to the *American Journal of International Law*, 29 (1935), pp. 446, 447.
[58] *American Journal of International Law*, 20 (1926), Special Number, pp. 318-322.

shown, for instance, in the practically unanimous judgment of the Permanent Court of International Justice in the case of *Eastern Greenland*—have demonstrated that situations of great complexity going back into the distant past and affecting considerable territories can be solved by the application of legal rules. With regard to conflicting claims resulting from discovery and disputed degrees of effectiveness of occupation these rules, while admitting of a pronounced measure of elasticity in their application, are clear in principle. The obstacle to their being made a subject matter of codification is political, not legal. The negative importance of the political obstacle may decrease in proportion as it is realized that only an authoritative formulation of the law on the subject may be able to remove the existing unedifying accumulation of conflicting and mutually inconsistent claims with regard to the sovereignty over Arctic and Antarctic regions Within the framework of some general statement of the law—in one of the forms envisaged in article 23 of the Statute of the Commission—its work may prove a factor in overcoming what may otherwise be an insoluble deadlock.

65. In this connexion consideration may be given to the question to what extent it is feasible, through an authoritative statement of the required period of limitation, to formulate a rule of international law with regard to prescription. The experience of the British-Venezuelan Guiana Arbitration showed that, within a general scheme of codification, the formulation of some other requirements of acquisitive prescription might usefully be attempted. The numerous decisions of high tribunals, such as the Supreme Court of the United States, which have applied the doctrine of prescription to territorial disputes between members of Federal States, would provide instructive material on the subject. It is possible that the majority of the members of the League of Nations Committee of Experts in denying the existence—and, indeed, the propriety of the existence—of prescription in international law,[59] did not fully take into account both established doctrine and judicial and arbitral practice. Numerous decisions of national courts may also act as a reminder that there are questions of a technical character related to the territorial domain of States which are capable of systematization and clarification through any one of the methods open to the International Law Commission. These include some technical questions of determination of boundaries, the rule of the thalweg, accession and alluvion, and the like.[60]

66. Thirdly, with the prohibition of the right of war—either as the result of the Charter of the United Nations or of the General Treaty for the Renunciation of War—the time would appear ripe for a revaluation of the role of conquest as conferring a legal title. There is room for the view that,

[59] *Minutes of the First Session*, 1925, p. 39.

[60] Some of these questions were covered by Project No. 10, referred to above, of the American Institute of International Law.

within the framework of a codification of international law, the principle of non-recognition of acquisition of territory by force may find a place as a legal rule denying the title of conquest to States resorting to war in violation of their fundamental obligations.

67. In addition to the modes of original acquisition of territory, a number of other questions would seem to require clarification in connexion with acquisition of and changes in sovereignty. These include the question of the effect of changes of sovereignty—through conquest or cession—upon the nationality of the residents of the territories concerned, in particular of persons not resident in the territory at the time of the transfer of sovereignty. Secondly, experience has shown that the regulation by treaty of the right of option frequently raises problems for the solution of which a general formulation of the applicable law would be both feasible and useful.

(6) *The Regime of the High Seas*

68. The question of the codification of the law of the sea presents itself under two aspects, both of which are well illustrated by the two subjects which fall within this branch of international law and which were considered by the League of Nations Committee of Experts. The first was one which may perhaps more properly be considered as falling within what the Statute of the International Law Commission describes as development of international law, namely, the introduction of predominantly new rules of law aiming at regulating some common international interest. This was to some extent the question of the exploitation of the products of the sea. The League of Nations Committee of Experts, after receiving the replies of the Governments and the report of Dr. Suarez, one of its members, came to the conclusion, at its second session, that the report submitted to it indicated the problems which a conference including experts of various kinds might be called upon to solve and emphasized the urgent need for action. At their third session in 1927 the Committee decided that the international regulation of that branch of the law of the sea can best take place by means of a special procedure involving the co-operation of experts, in particular of the Permanent International Council for the Exploitation of the Sea located at Copenhagen.

69. It will be noted that even in respect of subjects such as the exploitation of the products of the sea, the borderline between "development" and "codification" of international law is necessarily elastic—inasmuch as these subjects, too, are covered by a considerable body of progress. Thus the Rapporteur of the Committee, in a report drafted in 1925, submitted a list of sixteen international treaties on the regulation of maritime industries. Since then, further important conventions on the subject have been concluded, such as the Halibut Conventions of 1930 and 1937 between Canada and the United States of America; the Sockeye Salmon Fisheries Conven-

tion of 1930 between the same countries; the Regulation of Meshes Agreement of 1937; the London Fisheries Convention of 1943; and the series of Conventions and Protocols concerning the regulation of Whaling of 1931, 1937, 1938 and 1944. Primarily, however, this would appear to be a subject to be covered by the procedure appropriate for the "development" of international law within the meaning of the Statute of the International Law Commission. The proposals, submitted in this connexion by the International Law Association[61] and the Institute of International Law,[62] for an International Sea Commission emphasize this aspect of the problem.

70. On the other hand, by far the greater part of the law of the sea would more suitably fall within the framework of "codification". For the law of the sea, perhaps more than any other branch of international law, would seem to call for a comprehensive codification in the light of the existing considerable practice intent upon preventing the principle of the freedom of the sea from being transformed into a regime of anarchy. That practice has produced a number of conventions regulating transport by and safety at sea such as the Conventions, concluded under the auspices of the International Maritime Committee, on the unification of the law in regard to collisions, on the law respecting assistance and salvage at sea (a Convention amplified by the Treaty of Montevideo relating to salvage by aircraft at sea), on the limitation of shipowner's liability, and on the carriage of goods by sea (the York-Antwerp Rules adopted by the International Law Association in 1890 and repeatedly revised; the Hague Rules of 1921; and the Brussels Convention of 1924 on the unification of rules relating to certain bills of lading); and on maritime liens and mortgages (the Brussels Convention of 1926). There is, in addition, a considerable amount of State practice in the form of instruments for securing the safety of traffic on the high seas, such as the Convention for the Safety of Life at Sea concluded in 1914 and revised in 1929, the International Load Line Convention of 1930, and the Convention of 1930 concerning manned lightships not on their stations. The International Code of Signals has now acquired a recognized international character. Various other conventions, such as the International Radiotelegraph Convention, the International Convention for the Protection of Submarine Cables, the numerous Conventions relating to slavery and the slave trade, and treaties aiming at curbing abuses such as illicit liquor traffic, have regulated other aspects of the law of the sea.

71. Alongside that conventual regulation of a substantial part of the law of the sea, there exist rules of customary law, some of them of long standing and of a great generality of acceptance. They include the principle of the freedom of the sea in its various applications, the law relating to navigation through straits, to ship's papers, to the powers of visit and search of ships in time of peace, to hot pursuit, to the regime of the surface and subsoil

[61] Report of the International Law Association of 1926, p. 104.

[62] *Annuaire*, 39 (1934), pp. 711-713.

of the bed of the sea, and to piracy. The last-named was the only subject of the customary law of the sea which the League of Nations Committee of Experts considered ripe for codification, but which the Council and the Assembly of the League did not regard as being of sufficient importance to warrant the convening of an international conference for the purpose of codifying it. Recent experience has shown that that particular subject, which is one of the oldest branches of customary international law and on the general principles of which there is a substantial measure of agreement—though not as universal as is widely assumed (see above, paragraph 10)—is in need of clarification. This applies not only to such, apparently novel, questions of detail as piracy in territorial waters or the criminality of attempts at piracy, but also to the more fundamental question whether piracy is limited to acts committed by private individuals *animo furandi*.

72. The law of the sea offers an inducement which is of some urgency for a co-ordinated effort at codification. For in the absence of international regulation aiming at introducing clarity and a reconciliation of conflicting interests the regime of the freedom of the sea often threatens to assume a complexion of waste and disorder calling for unilateral measures of self-help. While in some matters the principle of the freedom of the seas provides a sufficient and rational basis for a regime of order and co-operation, in others it is productive of gaps which are inimical to peaceful relations between States and to the general international interest. The award in the *Behring Sea Arbitration* affirming the principle of the freedom of the sea disclosed the unsatisfactory nature of the position created by exclusive reliance upon it. The arbitrators, in compliance with the authorization of the parties, recommended a regime based upon a more rational application of the rule. Numerous treaties have been concluded relating to the proper exploitation and preservation of the resources of the sea. But they have not fully met the situation and the conclusions of the League of Nations Committee of Experts emphasized the urgent need for international regulation. Failing such regulation, nations will have recourse to unilateral action which, while unimpeachable as a matter of equity and justice, is a reflection upon the regulative force of international law. The action of the United States, Mexico, Argentina and Chile in 1945, 1946 and 1947 with regard to the conservation of the natural resources of the sea adjoining their territories provides an instructive example of the drawbacks of the existing situation.

73. In view of the already available substantial body of practice, in the form of conventions and otherwise, in these matters it would appear that they would more properly fall within the framework of codification rather than "development"—although it would be codification with a considerable element of "development" in it. As mentioned, there is in existence an imposing body of non-controversial rules and principles on other aspects of the international law of the sea. This being so, it must be a matter for consideration whether, of all the branches of international law, that of the

law of the sea does not lend itself to comprehensive treatment by way of codifying the entire branch of the law. A codification—in its widest sense—of the entire field of the law of the sea in a unified and integrated "restatement" or similar, more ambitious, instrument, would go far towards enhancing the authority both of the work of codification and of international law as a whole.

(7) *The Regime of Territorial Waters*

74. In this branch of international law the task of codification will probably proceed on the basis of the achievements of the Hague Codification Conference of 1930 and of the preparatory work which preceded it. No expression of opinion is called for here on the question whether the results of that Conference may legitimately be called a failure. It will be noted that the Conference produced some agreed instruments in the form of Articles on the Legal Status of the Territorial Sea—a detailed and valuable document— and on the base line, both in general and with regard to the particular cases of bays, islands, groups of islands, and straits. There is general agreement that the bases of discussion, the documentation on which they were based and the discussions in the relevant Committees provide material of the utmost usefulness. However that may be, in attempting the codification of this part of international law the Commission will be in a position different from that of the Committee of Experts and the Hague Conference. Its task will not be limited to that of adopting articles and producing a draft intended to be accepted as a convention requiring the agreement of all or most States. On the crucial question of the extent of territorial waters it will be in the position to state the existing law in terms not only of agreement, but also, in an analytical and critical manner, of the absence of agreement; it will be able to disregard extravagant demands; it will possess the authority to put unorthodox but justified claims in terms of principle rather than of mileages. It will be in the position to attach significance to prescriptive rights, to important economic and strategic interests, to changes resulting from modern conditions. By reference to these factors it will be in the position to approach the no less crucial question of the contiguous zone and protective jurisdiction.

75. The fact that the International Law Commission is by its Statute enabled to adopt methods and pursue objects somewhat different from those which the League of Nations prescribed for the Committee of Experts suggests that it may be possible to achieve a distinct measure of continuity in relation to past efforts at codification. There need be no disposition to discard subjects with regard to which previous efforts are deemed to have failed. For the failure which attended one method and one object need not be decisive with regard to different methods and objects. Moreover, it would be unfortunate if the regulation of questions of obvious importance in the sphere of international transport and international economic intercourse

generally—such as the position of foreign merchantmen in territorial and national waters—were to suffer from the inability to achieve uniformity with regard to the breadth of territorial waters.

IV. THE INDIVIDUAL IN INTERNATIONAL LAW

(1) *The Law of Nationality*

76. As in the matter of the two other subjects covered by the work of the Hague Codification Conference, so also with regard to the question of nationality, the International Law Commission will be able to draw upon instructive lessons of past experience. Both in the formal and in the substantive sense the achievement of the Conference in the matter of nationality was a promising one. It produced a Convention and a number of protocols on subjects which had previously shown a conspicuous divergency of practice and of doctrine and which, because of the importance of nationality, were considered to be highly political. Moreover, the adoption of these instruments was followed in some countries by legislative changes with regard to matters which had been considered as constituting characteristic and permanent features of national jurisprudence. But it would probably be a mistake to exaggerate the significance of the achievement of the Hague Conference in the matter of nationality and to assume that that subject need no longer be considered for the purpose of codification. In particular, it may not be fully accurate to gauge the achievement of the Conference from the fact that it produced a Convention—an instrument which has not secured many ratifications in excess of the minimum number of ten required for its entry into force. While the Convention embodied agreement on such questions as the general principles governing conferment of nationality and the diplomatic protection of persons of dual nationality, no agreement proved possible on important questions of substance such as the removal of the principal causes of double nationality and of statelessness and the right of expatriation. Mainly owing to the solution—or semblance of solution—adopted by the Conference on the latter subject, the United States declined to sign the Convention. No serious attempt was made to investigate the possibility of a single criterion for acquisition of nationality by birth. While the Convention recognized the right of persons of dual nationality to renounce one of them, it made such renunciation conditional upon the authorization of the State whose nationality was being surrendered. With regard to nationality of married women, the subsequent legislation of some countries has gone further than the hesitating provisions of the Convention which in this respect lags behind recent developments. Of the protocols adopted by the Convention—they all referred to matters of detail—only one (that relating to military service of persons of double nationality) has entered into force.

77. It may thus be said that while revealing the potentialities of the international regulation of the subject, the work of the Hague Codification Conference on the question of nationality touched only the fringes of the problem. In an era of economic nationalism and isolation, when freedom of movement across the frontiers tends to become nominal, the urgency of an international regulation of conflicts of nationality laws and statelessness is less apparent. But, it is to be hoped, the position in this respect may undergo a change. Moreover, in an international system in which the fundamental rights and freedoms of the individual are bound to gain increasingly effective recognition, the law of nationality is likely to become once more the subject of remedial codification aiming both at systematizing existing agreement and at removing anomalies which are a cause of inconvenience and are derogatory to the dignity of man. With regard to the right of expatriation, the Convention on Nationality adopted in 1933 by the Seventh International Conference of American States may provide a promising starting point for further efforts at codification.[63] This applies also to some other questions regulated in that Convention.

78. With regard to the abolition of statelessness—a status, or the absence thereof, which is both derogatory to the dignity of the individual human being and a reflection upon the logic of traditional international law which makes the possession of nationality the only link between the individual and the benefits and duties of the law of nations—the Hague Conference made little, if any, progress. The Protocol which it adopted with regard to the deportation of persons denationalized while abroad was based on the assumption of the continuation of statelessness in international law rather than on its abolition. However, it is probable that in this respect the proper sphere of international regulation through the efforts of the International Law Commission will be not through codification, but through "development" aiming at introducing a departure from the existing practice. That practice still continues to multiply the potential causes of statelessness. In particular, many countries have recently adopted or are on the eve of adopting legislation which provides for the deprivation of certain classes of their citizens of their nationality by way of punishment for disloyalty or otherwise.

(2) *The Treatment of Aliens*

79. The reasons which have been adduced in the previous section as militating in favour of a renewed effort at codifying the law of nationality and of conflicts of nationality—the growing movement across frontiers in an age in which barriers of distances have dwindled and the enhanced status

[63] Articles 1 and 2 of the Convention provide, in simple language, as follows:

"Article 1.—Naturalization of an individual before the competent authority of any of the signatory States carries with it the loss of the nationality of origin.

"Article 2.—The State bestowing naturalization shall communicate this fact through diplomatic channels in the State of which the naturalized individual was a national."

of the individual as the subject of fundamental rights and freedoms—apply even more cogently to the question of the treatment and the legal position of aliens. Apart from the somewhat general provisions of the Convention on the Status of Aliens adopted in 1928 by the Sixth International Conference of American States, and apart from individual references to the civil equality of aliens in resolutions adopted by the Pan-American Conferences (e.g. in article 2 of the resolution of the Seventh Conference in 1933 on the International Responsibility of the State), this subject has so far remained outside the orbit of the codifying movement. Some aspects of it were, indirectly, discussed in connexion with the question of the responsibility of the State for damage done to the persons and property of aliens within the framework of the Hague Conference of 1930. The matter was examined in detail by the Economic Committee of the League of Nations, as one aspect of the "equitable treatment for the commerce of all members of the League", which members undertook to observe in Article 23 of the Covenant. It includes such questions as the taxation of aliens; their right to exercise any particular profession, industry, or occupation; the treatment of aliens in respect of residence, travel, the right to hold and bequeath property; the extent of the obligation to perform public services of local and national importance. There is on this subject a substantial body of State practice which, however, is only imperfectly related to principle. In some cases that practice is due to particular economic or strategic considerations, and it may be difficult to put it within the framework of a generally applicable rule. The League Committee formulated a draft convention which, in most matters, constituted not so much an attempt to state the rule of law on the basis of existing practice as an expression of desirable rules of equitable treatment.[64] The draft was submitted in 1929 to a Conference but the results of its deliberations proved inconclusive.

80. The International Law Commission may have to give detailed consideration to the question whether these and similar aspects of the treatment of aliens ought to be brought within a uniform rule of international law or whether they ought to be left to the discretion of States and to bilateral agreements. The question would also have to be considered to what extent it is feasible to provide for equality of treatment as between alien and alien and to prohibit discrimination against certain categories of aliens with regard to both economic benefits and to eligibility for legal assimilation to the majority population.

81. In one definite respect the law relating to the treatment of aliens would seem to require authoritative statement or restatement, namely, with regard to (1) the full equal protection of such rights as they possess by the law of the State, and (2) absolute recognition and protection of what the Charter of the United Nations describes as human rights and fundamental

[64] See League Docs. A.11, 1923. II; A.52, 1924. II; A.46, 1925. II. See also, for a useful survey, *The Legal Status of Aliens in Pacific Countries*, edited by Norman MacKenzie (1937).

reedoms. So long as the equality of the rights of the alien and of the national has not become part of international or domestic law, the rule—which is an undoubted part of international law—must be authoritatively affirmed that the position of the alien before courts and administrative authorities is the same as that of the national for the purpose of asserting rights granted to him by the law of the State. That duty is already recognized in the form of the obligation of the State to prevent denial of justice. But there would appear to be room for an expansion of that principle, for instance, by generalizing the rule, adopted in numerous treaties, to the effect that aliens, like nationals, are exempted from the requirement to deposit security for costs.

82. Secondly, the effective recognition of the provisions of the Charter of the United Nations relating to human rights and fundamental freedoms—applicable by definition to nationals and aliens alike—would naturally find a place in any codification of the law relating to the treatment of aliens. The controversy, which was largely responsible for the negative result of the Hague Codification Conference, on a subject of whether a State can adduce the fact of non-discrimination as a reason for relieving it of responsibility for the treatment of aliens has now been resolved so far as fundamental human rights and freedoms are concerned. The principle authoritatively asserted by arbitral tribunals, that the plea of non-discrimination cannot be validly relied upon if the State does not measure up to a minimum standard of civilization, has now found expression in the provisions of the Charter relating to human rights and fundamental freedoms. These must be deemed to be co-extensive with the minimum standard of civilization. Thus some courts in the United States have held that the enjoyment of certain fundamental rights guaranteed by the Constitution must be conceded even to those aliens who have entered the country illegally; this applied, in particular, to the right of access to courts. It is possible that the adoption of an International Bill of Human Rights may be of assistance in defining what constitutes the minimum standard of civilization. Even after an effective Bill of Rights has materialized there will still remain the question of the relevance of the plea of non-discrimination in matters other than those pertaining to the "minimum standard of civilization", such as the limits of the respect for property of aliens. It will be a matter for consideration whether the answer to that question can be attempted within the framework of a codification of the law relating to aliens. It is possible that in the recent experience of various controversies on the subject there may be discernible a solution which would act both as an inducement to and as a basis of codification.

83. In connexion with the codification of that part of the law relating to the treatment of aliens which bears upon human rights and fundamental freedoms, there may also be considered the desirability of formulating as part of this branch of the law the rules relating to the treatment of stateless or similarly situated persons. In general conventions concluded before

the Second World War—such as the Convention of 1936 concerning th status of refugees from Germany—the refugees, stateless and other, were i most respects assimilated to aliens with regard to residence and access t courts. So long as international law has not eliminated the possibility c a category of stateless persons it ought to make provision for making oper tive with respect to them those human rights and fundamental freedon which pertain to the human being as such regardless of the possession c any nationality.

84. Finally, in connexion with the codification of the law relating to th treatment of aliens it will probably be necessary—and feasible—to formulat the law relating to the expulsion of aliens and stateless persons. Arbitra practice has clarified the law sufficiently to make such an attempt practicabl The principle that aliens lawfully admitted and permanently establishe must not be arbitrarily expelled has tended to receive general recognitio It will still be necessary to define, in connexion with a general codificatio of the law on the subject, the details and conditions of its application.

(3) *Extradition*

85. The codification of the law of extradition—largely in the direction c evolving a general treaty of extradition—has been the subject of numerou and, in many cases, successful attempts on the part of private individual scientific bodies, and Governments.[65] Of the latter efforts, the Treaty o 1911 between Argentina, Paraguay, Uruguay, Bolivia and Peru, the Busta mante Code of 1928, the Convention on Extradition signed in 1933 at th Seventh International Conference of American States, and the Centra American Convention of 1934 are in force and have received frequen judicial application. The subject of extradition received detailed attentio on the part of the League of Nations Committee of Experts. In 192 the Committee, in reliance upon the conclusions of a sub-committee, adopte a report according to which only the following five questions could pro perly be made the subject matter of codification by way of a general inter national convention.

1. The question whether and in what conditions a third State ought t allow a person who is being extradited to be transported across its territory

2. The question which of two States both seeking extradition of the sam person from a third State ought to have priority over the other.

3. The questions which arise as to the extent of the restrictions on th right of trying an extradited person for an offence other than that for whic he was extradited and a State's right to extradite to a third State a perso who has been delivered to it by way of extradition.

[65] These attempts are enumerated on p. 47 of the introductory comment of the Harvar Research Draft Convention on Extradition (Supplement to the *American Journal of Inter national Law*, 29 [1935]).

4. The question as to the right of adjourning extradition when the person in question has been charged or convicted in the country where he is, for another crime.

5. The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant State.

With regard to other, more substantial, questions such as extradition of nationals, the evidence of guilt required in support of a request for extradition, and the relative positions of the Executive and the Judiciary in connexion with extradition proceedings—the divergencies in the practice of States were, in the view of the Committee, such as to make impracticable any attempt to codify the law of extradition in the form of a general international convention. For these reasons the Committee refrained from including extradition in the list of subjects which were ripe for codification. These reasons were subsequently re-examined by the authors of the Harvard Research Draft Convention on Extradition. They were not considered sufficient for abandoning the efforts to codify the law on the subject. The resulting Draft Convention of the Harvard Research will doubtless provide a most convenient and useful starting point for any future efforts in this connexion. In addition, the Draft Convention is accompanied by a schedule containing draft articles of reservations on such subjects as capital punishment, fiscal offences, non-extradition of nationals coupled with the duty of prosecution by the requested State, and requirement of proof of a prima facie case either generally or in relation to the nationals of the requested State.

86. It will be for the International Law Commission to consider whether the reasons which prompted the League Committee of Experts not to include the Law of Extradition in the list of subjects ripe for codification are sufficiently persuasive in the light of the general nature of the task confronting the Commission. As already stated in other parts of this survey, the function of the Commission is not limited to drafting instruments offering an immediate prospect of acceptance by way of a general international convention. In this, as well as in other matters, it will be within the province of the Commission to consider to what extent the divergencies in national practice—especially in matters not reflecting an underlying conflict of important political or economic interests—can legitimately be regarded as an obstacle to codification rather than as an incentive to it. (It will be noted that because of the differences in national laws and procedure the Committee decided not to proceed with another subject of codification closely related to extradition, namely, communication of judicial and extra-judicial acts in penal matters and letters rogatory in penal matters.[66]

[66] See the discussion at the fourth session of the Committee, 1928, pp. 11-16. The Committee attached decisive importance to the fact that, according to what was believed to be a fundamental rule of procedure in Anglo-Saxon countries, witnesses could be heard only in the presence of the accused. However, at its fourth session, held in 1928, the Committee of Experts, in connexion with the consideration of a report of the Mixed Committee for the Suppression of Counterfeiting Currency, decided that "it is desirable and it would

87. There would seem to exist persuasive reasons counselling a unification and clarification of the law of extradition within the general task of codification. The law of extradition has traditionally served two purposes the importance and urgency of which have tended to increase rather than to diminish. In the first instance, the law of extradition is an instrument of international co-operation for the suppression of crime. Its increased importance is obvious at a time of rapid development of communications enabling offenders to leave the country where the crime was committed. Secondly, some aspects of the law of extradition have served to afford a measure of protection to persons accused of crime. This applies, for instance, to the rule that the extradited person must not be tried for a crime other than that in respect of which extradition has been granted (though the purpose of this rule is also, to some extent, to safeguard the sovereignty of the extraditing State). Above all, the function of the law of extradition covers one of its central aspects, namely, the principle of non-extradition of political offenders. While that principle has been recognized almost universally, there has been a considerable divergence in the practice of courts and in municipal legislation as to the manner of its application. Thus, for instance, according to the Finnish law of 1922 a political offence was extraditable if the act was in the nature of an atrocity. The French law of 1927 adopted a similar test. Both English and French courts have declined to extend the principle of non-extradition of political offenders to crimes committed in furtherance of anarchism on the ground, which is controversial, that anarchism, which does not aim at the substitution of one government (or form of government) for another, is not a political faith at all. In general, it is possible that the International Law Commission may find it difficult to act on the view that the differences of national laws and jurisprudence on the subject of extradition are so fundamental and decisive[67] as to render impracticable any attempt to include it within the general scheme of codification.

(4) *The Right of Asylum*

88. The question of the right of asylum, although closely connected with that of non-extradition of political offenders, is considerably wider in scope.

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seem to be realizable that, in multilateral conventions dealing with crimes and offences of which the prosecution and repression are recognized to be of international interest, collaboration between States in the preliminary judicial investigation of such crimes and offences should be ensured to the extent compatible with the criminal law of the Contracting Parties" (*Minutes*, p. 28). "In these circumstances and with these restrictions" the Committee felt able to recommend the formulation of international rules concerning the communication of judicial and extra-judicial acts in penal matters and letters rogatory in penal matters.

[67] Thus, for instance, during the discussion of the subject in the course of the first session of the Committee of Experts in 1925 the British representative adduced as a main reason for the unsuitability of extradition as a subject of codification the fact that the criminal law of some countries was distinctly territorial. But see the above section of this survey for the suggestion that the principle of territoriality of criminal law may not be as immutable as is occasionally believed.

In the first instance, it refers not only to the obligation not to extradite political offenders. It implies a positive duty to receive them. Secondly, it not only covers political offenders; it embraces victims of persecution fleeing from the country of oppression. Thirdly, it has acquired prominence in connexion with asylum in legations, warships, and military camps. It is this latter category of cases which forms the main subject matter of the Pan-American Convention on Asylum concluded in 1928, as distinguished from the more general Convention on Political Asylum adopted in 1933 by the Seventh International Conference of American States. At a time when revolutions in democratic States have not as yet become a matter of the past and when in other States the nature of the political regime produces a climate favourable to rebellion and persecution alike, the subject cannot be regarded as obsolete or as restricted to the principle of non-extradition of political offenders. In the Constitution of 1946 France reaffirmed its attachment to the principle of asylum for victims of persecution.

89. On the other hand, recent developments have not been uniformly in the direction of the vindication of the principle of asylum. This applies to such instruments as the Convention for the International Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court. These Conventions, signed by a small number of States in 1937, have not entered into force. Under the stress of the circumstances produced by the Second World War exceptions have been made with regard to traitors, "quislings", and persons acting contrary to the principles of the United Nations. In the Paris Peace Treaties of 1946 provision was made for extradition by the defeated States not only of war criminals but also of traitors accused of collaboration with the Axis Powers. It will be for the Commission to take stock of the situation. It is possible that in a world in which the observance of human rights and fundamental freedoms has become a reality there will be no room for revolutions which purport to vindicate the rights of man or for persecutions which assault them. It will be for the International Law Commission to decide whether that possibility is so distinct as to render unnecessary the more precise formulation, in modern conditions, of what has been regarded by many as a significant principle of international law and practice.

V. THE LAW OF TREATIES

90. The Law of Treaties has figured prominently, in various ways, in connexion with codification. It constituted what was perhaps the most ambitious and detailed effort in the work of the Harvard Research. It was considered in 1925 by the American Institute of International Law, the *projet* of which was submitted in 1927 by the Governing Body of the Pan-American Union to the International Commission of American Jurists and eventually adopted in 1928 by the Sixth International Conference of American States as a "Convention on Treaties"—a document somewhat general in character.

Some aspects of the subject were considered by the League of Nations Committee of Experts in connexion with the question "whether it is possible to formulate rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be". Although the Committee, after having received the replies of Governments, came to the conclusion that the subject was ripe for codification,[68] the Council of the League decided that the subject was "in no sense urgent" and recommended that it be further studied by the Secretariat.

91. Persuasive reasons may be adduced in support of the view that it is desirable to include the entire subject of treaties within the orbit of codification. Their place in the system of international law needs no emphasis. The majority of cases which came before the Permanent Court of International Justice were concerned with the interpretation of treaties. Yet there is hardly a branch of the law of treaties which is free from doubt and, in some cases, from confusion. This applies not only to the question of the terminology applied to the conception of treaties, to the legal consequences of the distinction between treaties proper and intergovernmental agreements, and to the designation of the parties to treaties. There is uncertainty as to the necessity of ratification with regard to treaties which have no provision for ratification; in the matter of the important subject of the relevance of the constitutional limitations upon the treaty-making Power; and in respect of conferment of benefits upon third parties. The field of interpretation of treaties continues to be overgrown with the weed of technical rules of construction which can be used—and are frequently used—in support of opposing contentions. The Permanent Court of International Justice did a great deal to reduce to proper proportions the rule that treaties ought to be applied so as to involve a minimum of restriction of sovereignty. Experience has shown the doubtful usefulness of the "liberal" interpretation of treaties. Thus, in the matter of extradition, in some cases the rule as to "liberal" interpretation has been invoked with a view to benefiting the accused; in others, in order to make the treaty more effective to the disadvantage of the accused. The rule that treaties must be interpreted so as to make them effective rather than ineffective has often been relied upon in disregard of the fact that the parties intended to limit the effectiveness of the treaty in a manner involving a minimum of obligation. Although the activity of international tribunals has now evolved a substantial body of practice with regard to the use of *travaux préparatoires,* that subject continues to be a matter of uncertainty and discussion in international proceedings. The divergent interpretations of the most-favoured-nation clause continue to cause difficulties, and it may be necessary to reconsider the view expressed by the League of Nations Committee of Experts

[68] There was, however, a difference of opinion in the Committee of Experts as to the methods best calculated to achieve that object. While the majority favoured an international conference, others preferred to entrust the subject to a limited body of experts. For a discussion of the subject see *Minutes of the Third Session,* 1927, pp. 42-44.

that the subject, which it discussed in detail on the basis of a thorough report, can be best dealt with by way of bilateral agreements.

92. Above all, there is room for a further scientific effort to clarify and make more precise the conditions of the operation of the doctrine *rebus sic stantibus*. Thus the Harvard Research Convention, following closely the decision of the Permanent Court of International Justice in the *Free Zones* case between Switzerland and France, adopted a formulation of the *clausula rebus sic stantibus* which many may find unduly restrictive (article 28). But if the principle of fidelity to treaties is to be maintained and strengthened, then a more searching enquiry than has been made hitherto is necessary as to the effect of changed conditions upon the continued obligation to perform a treaty. To say, as suggested in the Harvard Draft, that the change must refer to a "state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated" may mean attaching too rigid a condition upon the operation of the clause which, in the general interest, ought not to be reduced to a mere formula. There is reason to believe that this is the kind of subject which, both because of its importance and of its political implications, can be suitably treated by a highly authoritative body such as the International Law Commission in connexion with the condition of the law of treaties.

VI. THE LAW OF DIPLOMATIC INTERCOURSE AND IMMUNITIES

93. The subject of the Law of Diplomatic Intercourse and Immunities requires but brief comment in the present survey. The question of diplomatic privileges and immunities was among those which the Committee of Experts of the League of Nations, after studying the replies of the Governments, considered, without much hesitation, as ripe for codification. The Assembly of the League, while deciding in September 1927, that a conference should be convened for the purpose of codifying the Laws of Nationality, of Responsibility of States, and of Territorial Waters, was of the opinion that no action should be taken with regard to Diplomatic Privileges and Immunities.[69] What were believed to be the discouraging results of the First Hague Codification Conference and the political conditions of the world in the last decade of the existence of the League of Nations were responsible for the fact that no further attempt was made to proceed with the codification of a subject as to which there exists every substantial measure of agreement on matters of principle, which forms one of the oldest and most firmly established parts of international law and the application of which is a constant occurrence. In 1927 and 1928 the Committee of Experts considered also the question of the Revision of the Classification of Diplomatic Agents. However, in the light of the answers received from Gov-

[69] This was also the decision with regard to the Law of Piracy.

ernments the Committee found that the matter was not of sufficient urgency and importance to warrant its retention as one of the topics of codification. In 1928 the Sixth International Conference of American States concluded at Havana a Convention on Diplomatic Officers—an instrument which is of a more detailed character than most of the other Pan-American Conventions of this type and which is not confined to the question of diplomatic immunities. For it is also concerned with the organization of the diplomatic mission, the duties of diplomatic representatives, and the commencement and termination of the diplomatic mission. In 1932 the Harvard Research in International Law published a Draft Convention, accompanied by scholarly comment and abundant material, on Diplomatic Privileges and Immunities.

94. The work of the League of Nations Committee of Experts, of the Havana Convention of 1928, and of the Harvard Research, the documentation on which that work was based, as well as the rich sources of judicial practice, of diplomatic correspondence, and of doctrinal writing and exposition, provide sufficient material for a comprehensive effort at codifying this part of international law. The wealth of the available practice need not necessarily mean that such codification would be merely in the nature of systematization and imparting precision to a body of law with regard to which there is otherwise agreement on all details. This is not the case. Practice has shown divergencies, some of them persistent, on such questions as the limits of immunity with regard to acts of a private law nature, the categories of the diplomatic staff which is entitled to full jurisdictional immunities, the immunities of the subordinate staff, the immunities of nationals of the receiving State, the extent of the immunities from various forms of taxation, conditions of waiver of immunities, and the nature of acts from which such waiver will be implied. There may also have to be considered the consequences of the partial amalgamation, in some countries, of the diplomatic and consular services. For the task confronting the International Law Commission in this matter is not only one of diplomatic immunities and privileges, but also of the various aspects of diplomatic intercourse in general.

VII. THE LAW OF CONSULAR INTERCOURSE AND IMMUNITIES

95. Some of the considerations referred to in the preceding section on the codification of the Law of Diplomatic Intercourse and Immunities apply also to the Law relating to Consuls. Both constitute one of the oldest branches of international law; both loom large in the daily relations of States. In 1928 the League of Nations Committee of Experts reported to the Council of the League that the question of the "Legal Position and Functions of Consuls" was "sufficiently ripe for codification". In the same year the Assembly decided to reserve this question "with a view to subsequent conferences". For reasons already stated, no conference on this subject took

place. Important aspects of the Law of Consular Intercourse had been previously codified in the Caracas Agreement between some South American States in 1911. The Sixth International Conference of American States adopted in 1928 a comprehensive Convention on Consular Agents the principal sections of which are concerned with the appointment and functions of consuls, their prerogatives and immunities, and the suspension and termination of consular functions. The Harvard Research produced in 1932 a detailed Draft Convention on the Legal Position and Functions of Consuls. Any subsequent effort to codify this aspect of international law will, in addition, be able to rely on unusually extensive material in the form of regulations issued by almost all States to their consular representatives abroad, on a great number of treaties which cover the subject either within the framework of general treaties of commerce and navigation or in instruments devoted entirely to the legal position and functions of consuls.

96. While the law on the subject is based on the general recognition of the principle that consuls do not enjoy diplomatic character,[70] the existing practice, however abundant, does not show such a degree of uniformity as to make the work of codification one of mere co-ordination and systematization. It is of interest to note that the authors of the Harvard Research Draft, after drawing attention to the voluminous material on the subject, state that "a perusal of this material indicates that comparatively few of the functions and privileges of consuls are established by universal international law" and that "thus a code on the subject will be to a considerable extent legislation".[71] However, it is probable that in the field of consular functions and immunities the work of the International Law Commission will be less in the nature of legislation than in other fields. Thus in the matter of immunities of consuls from the civil and criminal jurisdiction of the receiving State with respect to their official acts, the existing practice, which is fairly uniform, will be found to be one of the application of the general rule of international law with regard to the jurisdictional immunities of foreign States. On the other hand, the International Law Commission will probably have to consider afresh the objections raised in the Committee of Experts to the codification of this branch of the law on the ground that, in view of the wide diversity in the economic and political conditions of various States, this was a subject more suitable for regulation by way of bilateral treaties.[72] Eventually the opinion prevailed that, in view

[70] The cautious wording of article 12 of the Havana Convention of 1928 may be noted in this connexion. It lays down that "in case of the absence of a diplomatic representative of the consul's State, the consul may undertake such diplomatic actions as the government of the State in which he functions may permit in such cases". An express reservation to this article was entered by Venezuela on the ground that "it is totally opposed to our tradition, maintained since it was established until the present time in a way that admits of no change".

[71] At p. 214.

[72] See the observations of the British representative at the third session of the Committee in 1927, *Minutes*, p. 25, and of the French representative at the first session, 1925, *ibid.*, p. 31. The replies of Governments were less favourable to codification than in the case of diplomatic immunities. While eighteen were in favour of codification, eight were against it. See *Minutes of the Fourth Session*, 1928, p. 16.

of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible.

VIII. THE LAW OF STATE RESPONSIBILITY

97. A substantial portion of international law relating to State responsibility has received attention and considerable study in connexion with the work of codification under the auspices of the League of Nations. The bases of discussion drafted in preparation for the Codification Conference of 1930; the replies of the Governments on which its draftsmen relied; the preliminary discussions of the Committee of Experts; and the work, however inconclusive, of the Conference of 1930—have all made a notable contribution to the further study of the subject. The same applies to the Draft Convention prepared in 1929 under the auspices of the Harvard Research. It was only natural that the preparatory work of a codification conference on the subject of the responsibility of States for damage to the person and property of aliens should cover what is perhaps the major part of the law of State responsibility. This is so for two reasons. In the first instance, treatment of aliens and injuries to aliens have constituted in practice the most conspicuous application of the law of responsibility of States. In the jurisprudence of international tribunals claims arising out of injuries to the person and property of aliens have constituted the bulk of the cases decided by them. Secondly, whatever may be the occasion for charging a State with responsibility under international law—whether it be the treatment of aliens, or the violation of a treaty, or failure to prevent the use of national territory as a base for acts noxious to the legitimate interests of neighbouring States—these questions are connected, in most cases, with the central problems of State responsibility and call for elucidation of conditions under which a State is liable. Thus questions of the responsibility of the State for acts of officials acting outside the scope of their competence, its responsibility for acts of private persons, the degree, if any, to which national law may be invoked as a reason for the non-fulfilment of international obligations, the requirement of fault as a condition of liability—these questions are common to all aspects of State responsibility. Some of these questions were discussed in connexion with the topic which was the subject matter of the Hague Conference. Others, referred to in the bases of discussion, were not considered by the Conference. These included: concessions and public debts, extent of liability for deprivation of liberty, losses incurred by foreigners as the result of insurrections and riots, liability of the State for the acts of its political subdivisions and protected States, the measure of damages, nationality of claims, factors excluding or limiting liability such as self-defence, reprisals and the Calvo clause. As mentioned, some of these problems are common to other aspects of the law of State responsibility.

98. However, it is clear that that branch of international law transcends the question of responsibility for the treatment of aliens. Its codification

must take into account the problems which have arisen in connexion with recent developments such as the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State. These, together with the question of superior orders, may be considered in conjunction with the codification of the principles of the Nürnberg Charter and Judgment as envisaged in the resolution of the Assembly. There are other questions which will require consideration in connexion with a codification of the law of State responsibility. These include the problem of the prohibition of abuse of rights—a subject of increasing importance in the growing and interdependent international society; the forms of reparation; the question of penal damages; and the various forms and occasions of responsibility resulting from the increasing activities of the State in the commercial and economic fields. Probably the Commission will also be confronted with the necessity of reconsidering the decision of the League of Nations Committee of Experts, reached by a majority vote at its fourth session, that extinctive prescription does not form part of international law and need not therefore be considered as a subject for codification.[73] Apart from the controversial nature of the reasons adduced by the Committee in support of its decision, the question of suitability for codification in respect of extinctive prescription—as, indeed, in respect of some other questions of limited compass—will assume a different complexion when considered as part of a codification of a wider branch of international law. It will be noted that the Eighth International Conference of American States decided in 1938 to proceed with the codification of various aspects of pecuniary claims, including the question of "prescription as extinguishing international obligations in the matter of pecuniary claims" (resolution No. XIX). Previously, the Seventh Conference had decided to recommend the study, in connexion with the work of codification under the League of Nations, of the entire problem relating to the international responsibility of States (resolution No. LXXIV).

IX. THE LAW OF ARBITRAL PROCEDURE

99. It may be a matter for consideration whether the formulation of a code of arbitral procedure could usefully be included among the tasks of the International Law Commission. No such task was contemplated in connexion with the work of the League of Nations Committee of Experts. A number of cases and incidents which took place mainly after the First World War and which arose out of the activities of the Mixed Arbitral

[73] See *Minutes of the Fourth Session*, 1928, pp. 18-22, and *ibid.*, pp. 47, 48, for the report of Professor Ch. de Visscher on the subject. It is of interest to note that in the previous year the Greco-Bulgarian Mixed Arbitral Tribunal, in the case of *Sarropoulos* v. *Bulgarian State*, affirmed emphatically that "prescription being an integral part of every system of law must be admitted in international law" and that "it was the duty of an arbitral tribunal . . . to consider the principles of international law in regard to prescription and to apply it in the specific case submitted to it" (*Annual Digest of Public International Law Cases*, 1927-1928, Case No. 173).

Tribunals and other organs of arbitration raised the question of an authoritative formulation of some of the principles of arbitral procedure. This was so in particular with regard to the effects of excess of jurisdiction or alleged excess of jurisdiction on the part of the Tribunal, and to such matters as the consequences of essential error in the award as well as rehearing and revision and interpretation of arbitral awards. By way of what may be clearly a legislative step, such codification might include provision for the appellate jurisdiction of the International Court of Justice, on the lines, for instance, of the proposal put forward by Finland in 1929 before the Assembly of the League of Nations and discussed in some detail by a representative Committee appointed by the Council. In general, the Draft Code of Arbitral Procedure submitted in 1875 to the Institute of International Law, the relevant provisions of the Hague Convention on the Pacific Settlement of International Disputes, and chapter IV of the Peace Code adopted in 1933 by the Seventh International Conference of American States might be resorted to as a starting point for any codification of the subject. The entire absence of any activity of arbitral bodies in the period immediately following the Second World War may suggest that the codification of that subject is a matter of purely academic interest. However, there may be a disadvantage in generalizing the negative experience of what may be no more than a passing period of transition.[74]

[74] In a resolution adopted in 1927 at Lausanne the Institute of International Law decided to continue the work begun on the subject in 1875 and to undertake the preparation of a Code of Arbitral Procedure.

PART III

The Method of Selection and the Work of the International Law Commission

I. THE METHOD OF SELECTION

100. The Survey of International Law undertaken in the preceding part of this memorandum, the conclusion of its first part and what is there suggested to be the correct interpretation of article 18 of the Statute of the Commission may be of assistance in supplying part of the answer to what otherwise appears to be the difficult and intractable problem of selection of topics for codification. The problem is of some obvious difficulty for there is no ready and practicable test of the "necessity" or "desirability", in the sense of article 18 (2) of the Statute, of codifying a particular topic. It is not easy, from this point of view, to assign any clear priority to any of the topics here surveyed. If the term "desirable" is intended to cover subjects the codification of which is comparatively easy on the ground that there exists concerning them a substantial measure of agreement offering a prospect of success in the proposed international regulation, and if that test is acted upon, then there is some danger that the stature of codification through the International Law Commission may be reduced at the outset to matters—and even these are very few in number—which are of little importance. It may be reduced to those subjects which the League of Nations Committee of Experts and the Assembly of the League discarded for the very reason that they were not important and therefore in no sense urgent. However, it is possible that the Commission may regard the term "desirable" as not differing substantially from "necessary"—as indeed seems to be indicated by the natural meaning of these words. In this case, the Commission will tend to select topics the codification of which is considered "necessary or desirable" because of the importance of their subject-matter having regard to international interest, the requirement of peaceful international intercourse, and the authority of international law. From this point of view it may be found, as already suggested, that there is no criterion of selection which is capable of general formulation and that all subjects are important and their codification "necessary or desirable". In fact, should the Commission approach the question of selection from the point of view of relative urgency—assuming that any such relation can be established—it may feel compelled to select the topics which the Committee of Experts and the Assembly of the League chose as ripe for codification by international conference and which it has proved impossible to regulate through that procedure.

101. The question of continuity of the task of codification in relation to the efforts of the organs of the League of Nations in and prior to 1930 will thus present itself for early consideration by the Commission. Such

consideration may, it is believed, have to be guided to a large extent by the fact that, because of the entirely novel character of the task of the Commission (which is not confined to the choice of subjects fit for immediate codification through an international conference), its standard of selection must differ from that adopted by the organs of the League. For while the test referred to in article 18 (2) of the Statute of the Commission is whether the codification of a topic is "necessary or desirable", the resolution of the Assembly of the League of 22 September 1924, laying down the terms of reference of the Committee of Experts instructed them "to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be the most desirable *and realizable* at the present moment". This latter condition—that the codification of the topics selected must be realizable—was often referred to in the deliberations of the Committee of Experts although, in the event, the codification of the three topics actually chosen for codification through an international conference proved to be not "realizable". However, in a considerable number of cases the Committee, while admitting that the codification of the proposed topic was desirable, discarded it for the reason that owing to the divergencies of national laws and jurisprudence the codification was not realizable. This took place with regard to subjects such as extradition, judicial assistance in penal matters, and jurisdiction of States with regard to crimes committed outside their territory. The International Law Commission is not confined to these narrow limits. There is no reference in its Statute to the necessity of any topic selected being "realizable" as a subject of codification. As already mentioned, the reason for that difference is not difficult to surmise. The International Law Commission is not limited to the selection of such subject as can be codified in the form of an international convention by an international conference of Governments or experts. It may, and is expected to, produce drafts of varying degrees of formal authority. A subject the codification of which may not be realizable by way of a convention adopted by an international conference, may still be a "necessary or desirable" subject of codification in any other of the various forms envisaged in articles 20-23 of the Statute. For this reason the scope of selection open to the International Law Commission is much broader than in the case of the League of Nations Committee of Experts. That scope is not only wider. In a substantial sense it is almost unlimited, inasmuch as the Commission is instructed to select subjects the codification of which is necessary or desirable.

102. It is in this latter respect that the work of the Committee of Experts is highly instructive as showing that the codification of *most* subjects of international law is necessary or desirable. This applies not only to the seven subjects which the Committee reported to the Council as ripe for codification. It applies also to those numerous topics, already mentioned, where codification was considered necessary but, owing to the divergencies in national practice, not realizable (a consideration which, as pointed out below, is of

very limited relevance in relation to the International Law Commission). Moreover, the hall-mark of "necessity" is applicable also to those few subjects which the Committee discarded for other—controversial—reasons, namely, that they were political in nature, as in the case of recognition of Governments and State succession, or that they were not yet covered by a sufficient practice of States, as in the matter of prescription. In fact, it is believed that the Commission will be faced with the task of considering, at the very outset of its activity, whether, in the light of principle and of previous experience, it cannot rightly be said that the codification of probably every subject of international law is necessary and desirable—"necessary and desirable" not in the sense of overwhelming and immediate urgency, but in the sense of appropriateness for international regulation made desirable by the necessity of removing uncertainty productive of confusion and friction, by the necessity of preventing waste of international resources, by the necessity of filling gaps and meeting the new conditions of international life, and, generally, by the necessity of enhancing the authority of international law. From this point of view there is room for the opinion that every subject discussed in the preceding Survey is a necessary and desirable subject of codification. This applies—perhaps with greater urgency than in other matters—to such seemingly theoretical questions as those referred to in the General Part of International Law, for instance, with regard to a codification of the principles governing the international rights and duties of individuals or the relation of international law to the law of the land. In general, however, there is no intrinsic priority and no corresponding standard of selection from the point of view of necessity or desirability of codification between subjects such as diplomatic immunities, extradition, obligations of territorial jurisdiction, State responsibility, the law of treaties, acquisition of territorial sovereignty, problems of the law of the sea, and so on.

103. If we bear in mind that most questions of international law are generally of equal importance as objects of codification, that it may be found difficult to discover a working test of preference for the purpose of deciding whether it is necessary or desirable to codify a particular subject, and that the Commission must nevertheless proceed to some selection for the reasons both that it is instructed to do so by the Statute and that it cannot possibly codify all subjects at once—if we bear these factors in mind then the problem of selection no longer appears as one of perplexing and arbitrary choice. On the contrary, it resolves itself into a question of priority in point of time, within the framework of a comprehensive scheme embracing potentially the entirety of international law and by reference to such factors as the amount and accessibility of material on any given subject, the availability of the appropriate personnel, and the continuity with the work already performed under the auspices of the League of Nations. Thus the Commission may wish to consider whether, in the first instance, it ought to continue the work on subjects which the League Committee of Experts declared to be ripe for codification or which, after ample investigation, it

discarded for the reason that owing to divergencies of national laws and jurisprudence no codification through international conference was feasible (a reason which, once more, does not apply to the International Law Commission, since its function is not limited to producing drafts to be accepted forthwith as conventions). On the other hand, it may be hoped that the selection of topics will be made by reference to a comprehensive and long-range plan, which could be the product of mature and prolonged deliberation, of codifying international law as a whole over a period which may cover a generation. The following three questions may have to be considered in this connexion.

104. In the first instance, a decision will have to be made whether the topics selected shall cover limited and isolated branches of the law or whether the work of the Commission at any given period shall be devoted to a wider subject. By way of example, shall the work of the Commission at any given time embrace isolated and disconnected questions such as prescription, jurisdiction over aliens for crimes committed abroad, piracy, and extradition, or shall the policy be to limit the work of the Commission in one period of specific aspects of one integrated subject such as the law of the sea, the law of treaties, the law of jurisdictional immunities of States (i.e., States as such, their property, their ships, their armed forces, and so on)? Each of these general subjects could be divided and studied *pari passu* by a number of co-ordinated bodies. It is possible that in order to obviate the necessity of a selection of topics by reference to tests which at best are controversial and subjective, the Commission may decide to choose the broad fields of study in accordance with—and, possibly, in the order of—a systematic classification of international law on some such lines as suggested in the survey undertaken in part II of this memorandum. Thus it is possible that in any given period various Rapporteurs of the International Law Commission will be devoting themselves each to a specific problem within the wider division. A procedure on these lines might have the double merit of (*a*) giving an element of cohesion and integration to the work of the Commission, (*b*) preventing the impression, which would be detrimental to the authority of the Commission and to the usefulness of its work, that it is concerned with matters of minor importance selected at random.

105. Secondly—and this is a matter connected with the selection of topics—the Commission may have to consider at an early stage whether its drafts shall be in the form of a general statement of principle (as is the case in some of the codification conventions concluded by the American States) or whether they should follow the lines of the bases of discussion prepared for the Hague Codification Conference of 1930 on the subjects of Territorial Waters and State Responsibility or, apart from its occasional deliberate obscurity and evasiveness, the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. The problem of the degree of the requisite generality of the law is, of course, not confined to codification of international law. In approaching it the Commission will probably have to

take into account the fact that, in so far as one of the principal incentives for the codification movement in the international sphere is the removal of uncertainties in the law, that object cannot be achieved by instruments of a general character. Similarly, in so far as the object of codification is to reconcile divergencies and remove causes of friction, that object can be achieved only imperfectly by drafts and conventions which may conceal continued disagreement behind the cloak of a vague and elastic statement of general principle. There may be a disadvantage in weakening the authority of customary law by pronouncements of studied generality and incompleteness which are of limited usefulness for the settlement of disputes. International practice shows examples of such pronouncements in the form of conventions and otherwise.

106. Finally, it will probably be necessary to clarify the import of article 18, paragraph 2, which lays down that "when the Commission considers that the codification of a particular topic is necessary or desirable, *it shall submit its recommendations to the "General Assembly"*. Does the italicized part of this provision mean that decisions of the International Law Commission relating to the selection of every individual topic are subject to confirmation by the General Assembly? Any such result does not follow from the terminology of article 18. The records of Sub-Committee 2 of the Sixth Committee suggest that the question of the proper meaning of the word "recommendations" as used in article 18, paragraph 2, was left open for interpretation by the International Law Commission.[75]

II. THE CHARACTER OF THE WORK OF THE COMMISSION

107. Before enquiring into the question of the method of the work of the International Law Commission, in particular with reference to article 20 of its Statute, it is necessary to consider the nature of the task of the Commission. The principal aspects of this problem were discussed in part I of the present memorandum, where it was submitted that the function of the Commission is not limited to a statement of the existing law by way of ascertaining the exact measure of existing agreement or disagreement. On the face of it, article 20 would not seem to limit the task of the Commission in any such way. It lays down that:

"The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

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[75] Proposals made in Sub-Committee 2 to define more specifically the word "recommendations" were defeated. Mr. Beckett (United Kingdom) proposed at the eleventh meeting of Sub-Committee 2 that this paragraph should be amended to read ". . . it should present its recommendations to the General Assembly in the form of draft articles or otherwise". This proposed addition was not carried, there being 7 votes in favour and 7 against. The representative of Australia then proposed that the paragraph be amended to read: ". . . should present its recommendations to that effect". This proposed addition was rejected by 7 votes against 5.

"(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

"(*b*) Conclusions relevant to:

"(1) The extent of agreement on each point in the practice of States and in doctrine;

"(2) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution."

These terms of article 20 suggest that it deliberately avoids any limitation of the function of the Commission to a mere registration of the existing law. In the first instance, it does not provide that the Commission shall confine itself to ascertaining the extent of the agreement and of the divergencies. On the contrary, it lays down that in the commentary to its draft the Commission shall present its *conclusions relevant to* the extent of agreement or divergencies. This implies a critical task of appreciation and of weighing the causes of the existing discrepancies. Moreover, the Statute expressly instructs the Commission to presents its conclusions "relevant to . . . arguments invoked in favour of one or another solution". Secondly, the task of the Commission to arrive at a conclusion and judgment of its own is clearly indicated by its duty to prepare drafts in the form of articles. In the nature of things these cannot be hesitating, inconclusive and purely informative statements of detached compilation. They imply an expression of decisive judgment as to what is the proper rule of law. What is the proper rule of law in this context? It is, in the first instance, the rule based on existing law as evidenced, in the terminology of Article 38 of the Statute of the International Court of Justice, by international treaties, international custom, general principles of law and the subsidiary sources of law enumerated therein. In the absence of guidance from these sources of law—in particular, in the absence of agreement—the proper rule of law is that which in the view of the Commission ought to be the law. As already stated, in the case of the International Law Commission the possible combination of functions follows naturally from the varying degrees of formal authority which its drafts and comments may possess at any given time. Accordingly, much of the product of its work may follow the lines of some of the past great achievements of codification in the municipal sphere. They will not only be acts of international law finding, but also, if necessary, acts of international legislation and of international statesmanship.

108. The above considerations do not imply that the Commission will be absolved from stating, in the first instance, what the law is. To do that is its primary task, and it is probable that the Commission will wish to adhere to it wherever possible. In the sphere of codification—as distinguished from that of development of international law—the main purpose of the Commission is not that of an international legislator. Its function is essentially and in the first instance that of a judge. It has to find what the law is and to present it in a form which is precise, systematic and as detailed as the overriding principle of the necessary generality of the law allows.

109. However, that principal function of ascertaining the existing law does not exhaust the task of the Commission. In two respects it must go outside the province normally—but not invariably—reserved for the judge. In the first instance, when there is a divergence of practice or views it cannot be limited to purely formal solutions on which courts have occasionally relied—as they did, for instance, in the *Savarkar* case between Great Britain and France and in the *Behring Sea Arbitration* between Great Britain and the United States of America. In both cases the Tribunals solved the difficulty occasioned by the absence of a rule of international law directly applicable to the distinctly novel situation before them by relying on the fact that international law, in the particular case, did not impose upon the State in question any obligation to act in such a way as to renounce its freedom of action apparently grounded in a general rule of international law. It is controversial whether a formal test of that nature is sound even in relation to an international tribunal. Thus in other cases—as, for instance, in the *Trail Smelter* case between the United States and Canada—the Arbitrators held that the presumptive freedom of action of the State within its territory must yield to higher legal considerations which had previously received no imprimatur of an international convention or of international judicial precedent. It is doubly controversial whether such purely formal finding of the existing law is appropriate in relation to the task of codification. On the other hand, the International Law Commission will be in the same position as an international tribunal which in cases where there is a clear discrepancy of practice cannot solve the difficulty by pronouncing that there is no law at all for the reason that there is no agreed law. On the contrary, like an international tribunal, the Commission, entrusted with the task of codifying the law, must either choose among conflicting contentions or, more reasonably, formulate a solution which is in the nature of a compromise—a compromise not of a diplomatic character but one reached by reference to requirements of justice, of general interest of the international community, of international progress, and of the neighbourly adjustment of international relations, as well as to such established rules of international law in other spheres as are not inconsistent with these factors. In some cases, as in the case of the breadth of territorial waters, a solution of this nature may take into consideration, in terms of general principle, the legitimate interests of individual States and acquired and prescriptive rights. Or, as in the case of the plea of non-discrimination with regard to the responsibility of the State to respect the property of aliens, it may be found in what appears at first sight to be a mechanical compromise but which would in effect be a recognition of the fact that neither the absoluteness of the rights of property nor freedom from responsibility postulated by reference to the equality of treatment of aliens and nationals are, without qualification, a principle of international law.

110. There is, secondly, no reason why the independent creative function of the Commission should be limited to cases in which it has ascertained disagreement in the existing practice. For even in cases in which practice

has not revealed marked divergencies, it will be within the province of the Commission, after it has laid down what is the indisputable rule of law, to examine that rule in the light of modern developments and requirements and to suggest such improvements in the law and such modifications of the existing law as may be required in the interest of justice and of international social progress. There is no objection to the fulfilment of that duty—for a duty it probably is in terms both of the provisions of the Statute of the International Law Commission and of the task of codification in general—so long as the Commission contrives to preserve a clear distinction between what it finds to be the law and what it considers to constitute the necessary improvement of the law. The Statute lays down expressly, in article 20, that the task of the Commission embraces the presentation of conclusions, by way of a commentary, relevant not only to "divergencies and disagreements which exist" but also "to the extent of *agreement* in the practice of States and in doctrine". The performance of a task thus conceived is not inconsistent even with the function of a judge. International arbitrators have exercised it either in pursuance of a special authorization by the parties—as in the case of the *North Atlantic Fisheries Arbitration* between Great Britain and the United States—or independently of it. The last paragraph of Article 38 of the Statute of the International Court of Justice envisages the possibility of such an authorization. So long, it may be repeated, as the International Law Commission distinguishes clearly between what it finds *de lege lata* and what it proposes as the proper rule of law *de lege ferenda,* there is no objection—there is every inducement—to its acting in that capacity and to giving expression to a constructive and what is currently referred to as the sociological approach to international law.

111. In thus acting—with regard to cases both of agreement and of disagreement in existing law and practice—the Commission will be in a position to reduce to their legitimate proportions the divergencies and peculiarities of national laws and judicial and other practice. In the context of an international conference aiming at decisions which are unanimous or which approach unanimity, such divergencies assume the complexion of rigidity and permanency which is often out of all proportion to the national interest involved or even to the truly fundamental principles of international jurisprudence. Such divergencies are frequently a matter of form. As in the case of the alleged fundamental differences between the so-called Anglo-American and Continental conceptions of international law, they have proved, upon analysis, to be grossly exaggerated. There have been cases where divergencies which at an international conference were elevated to the dignity of an immutable principle of national law and tradition have been subsequently changed by normal and inconspicuous processes of international legislation. The changes effected in some countries in the law of nationality and of exemption of governmental agencies from civil liability may be quoted as an instructive example. However that may be, the International Law Commission is not in the same position as an international

conference aiming at unanimity or quasi-unanimity. Its province and its terms of reference are of sufficient breadth and elasticity to enable it to consider national divergencies of various kinds in the framework of a function of international legislation and statesmanship in their wider sense. In accomplishing this task the International Law Commission may be aided by a compilation—a synopsis—showing the divergencies in governmental practice, in national law, and in the jurisprudence of courts in the entire field of international law. A compilation of that nature would form a useful supplement to a Survey of International Law, in conformity with article 18 of the Statute, which the Commission may eventually adopt as the basis of its work. The usefulness of such a survey of divergencies—a work of some magnitude—would be enhanced if it were accompanied by a critical examination of the causes which underlie them.

112. These, then, are the two principal aspects of the task of the Commission: (1) the ascertainment, in a systematic form, of the existing law; (2) the development of the law, in the wider sense, "in the fields where there has already been extensive state practice, precedent and doctrine" (article 20), by filling the gaps, reconciling divergencies and the formulation of improvements in cases in which the situation calls for a combination of the consolidating and legislative aspects of codification. In addition, it must be a matter for consideration to what extent the Commission ought to combine with these tasks another function which is largely political in nature, namely, that of initiative and active assistance in the transformation of the products of its work into international conventions proper. This aspect of its task would involve constant consultation with Governments. The possibility of such consultation was suggested to the Codification Committee of 1947. Thus we find the following observation in the statement submitted by the representative of Brazil: "Neither the codification nor the development of law can be achieved merely by submission of learned opinions. They must take the form of resolutions by the General Assembly or of multilateral conventions. But these resolutions and conventions must not be submitted under 'take it or leave it' conditions."[76]

113. Finally, apart from the possibility of contributing directly to the development of positive international law by way of conventions and of influencing governmental and judicial practice by the products of its work which have not yet materialized into conventions, there will offer itself to the Commission an opportunity of a scientific achievement of unusual magnitude in the field of international law. If the Commission contrives to avail itself to the full of the avenues offered by Article 19 of its Statute[77]—a task which

[76] Doc. A/AC.10/28.

[77] Article 19 provides as follows: "The Commission shall adopt a plan of work appropriate to each case. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deem necessary."

requires a considerable amount of direction and centralization—then, in the course of time, it will assemble an abundance of material which has not been available in the past to other official or private organs of codification. That material when woven into the fabric of the drafts and commentaries of the Commission will represent a most valuable scientific result covering, in the fullness of time, the entire *corpus juris gentium*. Valuable as have been in the past the efforts of private initiative in this field, the cumulative product of the work of the International Law Commission, aided by the resources of the United Nations as a whole, ought—regardless of how much of it will materialize in the form of conventions—to represent a correspondingly higher achievement of lasting value, usefulness, and authority.

III. THE PROCEDURE OF CODIFICATION

114. In view of the observations of the preceding chapters concerning the character and the method of the function of the International Law Commission, only brief comment is required with regard to the procedure which may be followed in the matter of codification. Unlike the case of "development of international law", the Statute of the Commission does not prescribe in detail the procedure to be followed in the matter of codification. It merely lays down, in article 19, that "the Commission shall adopt a plan of work appropriate to each case". In general, it would appear that with regard to codification the volume of research, discussion and other preparatory work will be distinctly more considerable than in the case of "development". For in the former case the scope of the subject in relation to each particular topic will be both wider and covered by abundant material which will have to be collected, examined, and analysed. The Commission may consider the possibility of the following procedure.

115. The main part of the preparatory work on a given subject, when not entrusted to the Secretariat,[78] might be performed by a Rapporteur under the general guidance of and in constant consultation with a sub-committee of the Commission. In his work, which would have to extend in the first instance over a period of one year to eighteen months, he would have the professional collaboration of the regular members of the Secretariat in the Division for the Development and Codification of International Law, and of such special research assistants and consultants as necessary. One of the members of the Division for the Development and Codification of International Law would assume, at the request of the Rapporteur concerned, the responsibility for the collection, in the language of article 19 of the Statute, of "the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary".

[78] The Commission may desire to entrust much of the preparatory work to the Division for the Development and Codification of International Law in the United Nations Secretariat, as was done by the General Assembly in resolution 175 (II) of 21 November 1947.

116. The Commission would appoint, with regard to each particular topic, a sub-committee of three or four of its members to guide and to assist the Rapporteur in the preparation of the preliminary version of the draft and the commentary. Arrangements would be made, with that object in view, for frequent meeting—three or four times a year—between the sub-committee and the Rapporteur. The Commission and the sub-committee may have to lay down, from the very outset, the guiding principle that the actual preparation of the drafts and commentaries must be the responsibility of one person, and that it would be inconsistent with the scientific character and the importance of the work of codification to encourage any system of collective drafting.

117. After the Rapporteur, in co-operation with the sub-committee, has prepared the preliminary draft of the articles and of the commentary, the draft might be submitted to the International Law Commission. Comments might also be invited from bodies concerned with the scientific study of international law, in particular from the Institute of International Law. With regard to the latter it may be a matter for consideration to what extent the authority and resources of that highly qualified body of experts should be utilized in connexion with the work of codification. It might be possible to agree that, at least with regard to some topics, the Institute of International Law should appoint commissions the work of which would cover subjects studied by the Rapporteur and the sub-committee and that these commissions should comment and express an opinion on the drafts and commentaries. Similarly, the preliminary drafts of the articles and of the commentary covering the individual topics could be published for study and discussion by other scientific bodies, in particular the International Law Association—a committee of which, under the chairmanship of Judge McNair, produced a valuable report on the subject—and in legal periodicals. Thus the work of the Commission would be accompanied and aided by—as it would be a stimulus to—fruitful and invigorating scientific activity in the field of international law in various countries. The Commission may also find it desirable to maintain close contact with and to benefit from the experience of the organs of the Pan-American Union charged with the codification of international law. The detailed resolutions on the methods of codification of international law adopted by the Seventh International Conference of American States in 1933, by the Inter-American Conference for the Maintenance of Peace in 1936, and by the Eighth International Conference of American States in 1938, may be found of considerable assistance in this connexion.[79]

118. After a suitable interval—perhaps of one year or so—the Rapporteur and sub-committee would reconsider the preliminary draft of the articles and the commentary in the light of the criticism and observations of

[79] These resolutions are conveniently reproduced in *The International Conferences of American States*, First Supplement, 1933-1940. Published by the Carnegie Endowment for International Peace (1940), pp. 84, 145 and 246, respectively.

Governments, of the members of the International Law Commission, of scientific bodies and of private scholars. The revised draft would then be submitted for discussion by the International Law Commission as a whole and for such action as the Commission might consider appropriate by reference to articles 21-23 of its Statute. Such action would include, in the terms of article 22, the preparation of "a final draft and explanatory report" for submission, with recommendations, to the General Assembly. Even at this stage, in order to ensure continuity and to minimize the drawbacks inherent in collective drafting, the Commission, while retaining full responsibility for the final draft, might usefully consider the advisability of availing itself of the services of the Rapporteur and of the sub-committee concerned.

119. It may be assumed that at any given period a number of Rapporteurs and sub-committees of the Commission will be engaged in studying and proposing drafts and commentaries on a series of topics—probably within an integrated wider field in the sense suggested above. Thus, in the scheme as contemplated, the Commission—sitting either as a body or through its sub-committee co-operating with the Rapporteurs—would conduct its activity in semi-permanent session. In this respect it would differ from some other commissions, especially those set up by the Economic and Social Council. A development of this nature would be in accordance with the importance of the task entrusted to the Commission. Its Statute, which in its principal aspect is the result of a statesmanlike and beneficent compromise between the codification of international law through formal conventions and codification through non-governmental scientific statement and restatement of the law, affords the United Nations the opportunity, long awaited, of removing a grave defect in international law and of enhancing its usefulness and authority as a true system of law. It may properly be claimed that the scope and intensity of the work of the International Law Commission should be commensurate with the significance and the potentialities of the task with which its Statute and the United Nations have entrusted it.